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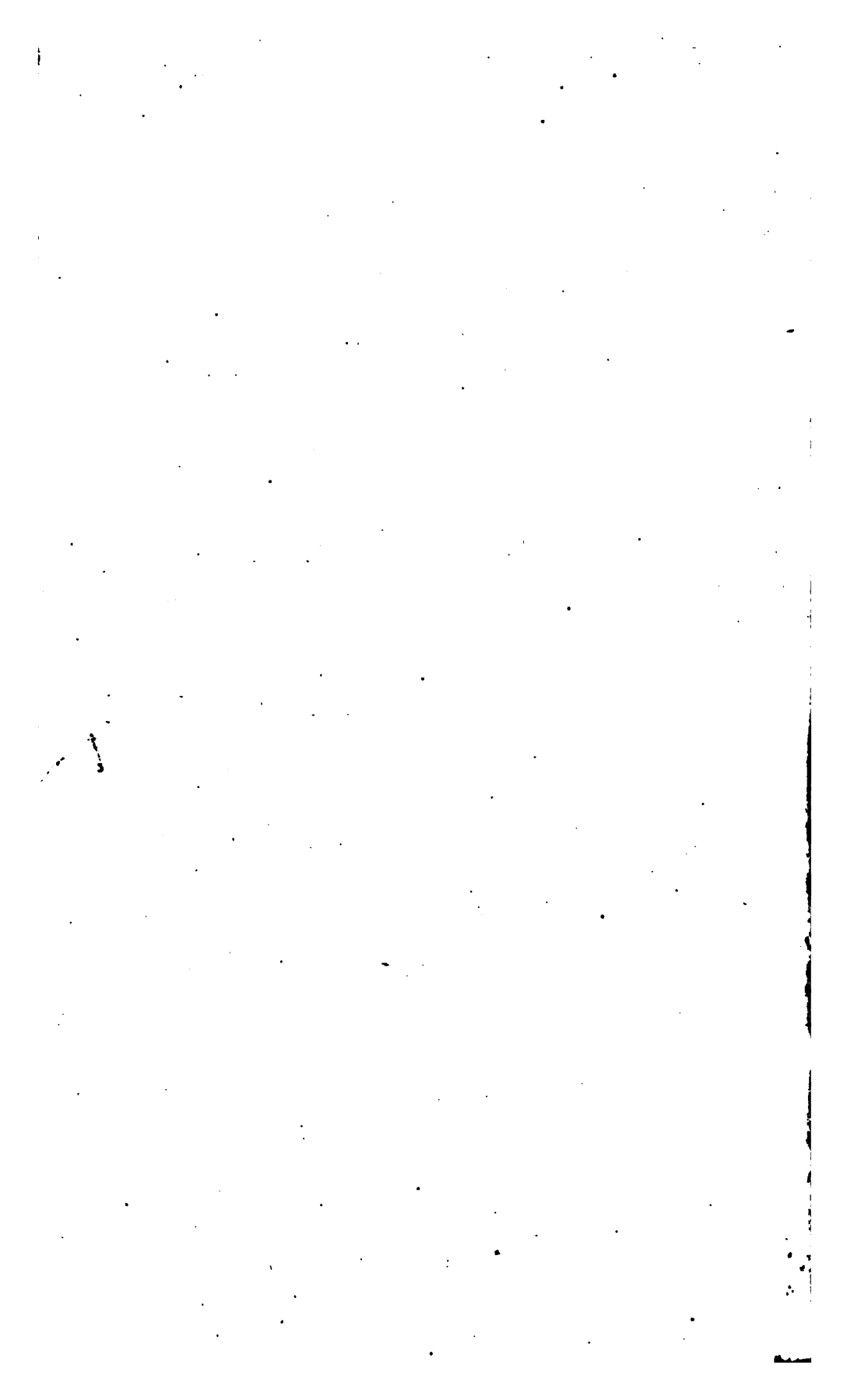
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Vol 2 1809

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A
TREATISE
ON
PLEADING:
WITH
A COLLECTION
OF
PRACTICAL PRECEDENTS,
AND
NOTES THEREON.

IN TWO VOLUMES—VOL. II.

BY JOSEPH CHITTY, ESQ.
OF THE MIDDLE TEMPLE.

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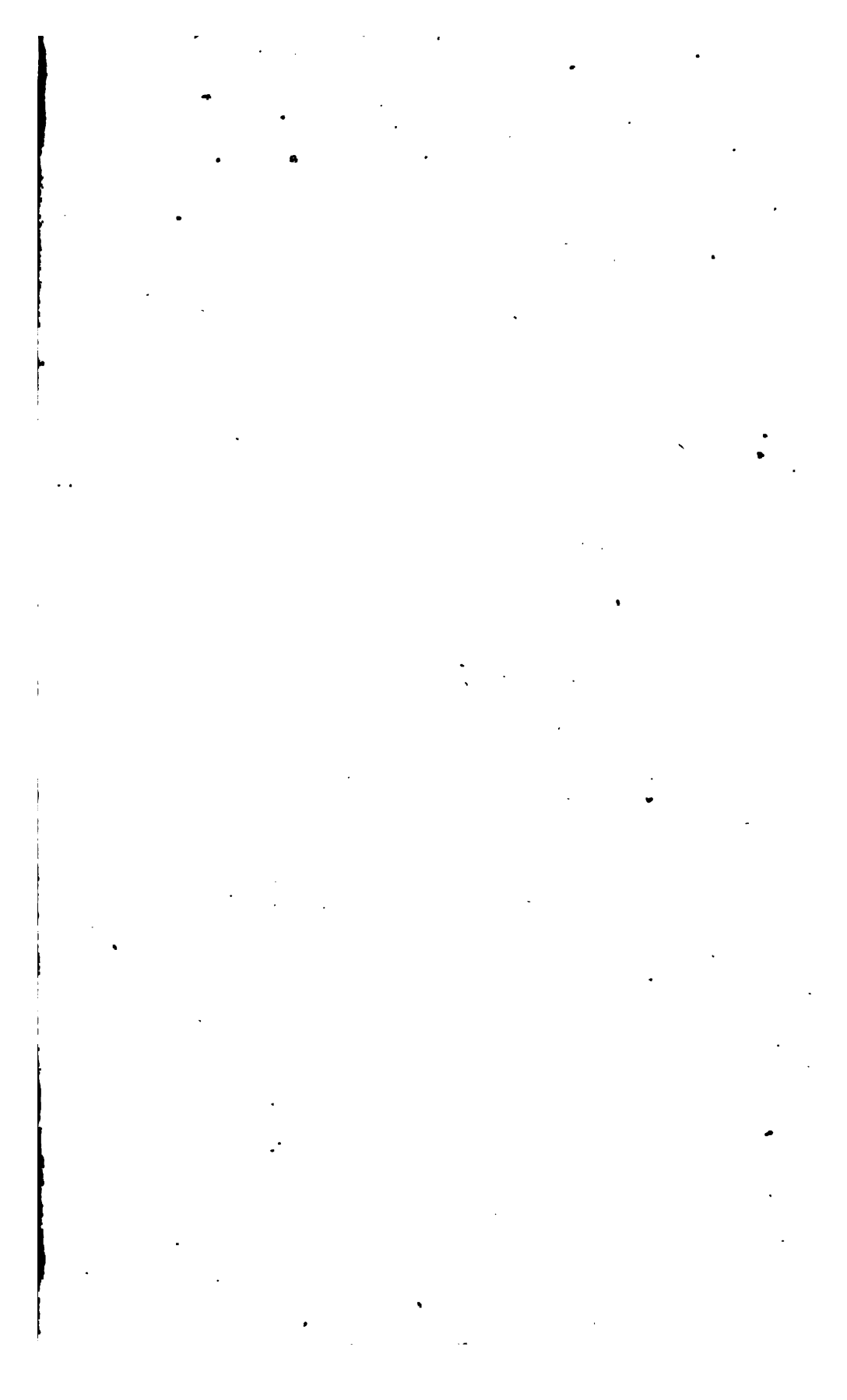
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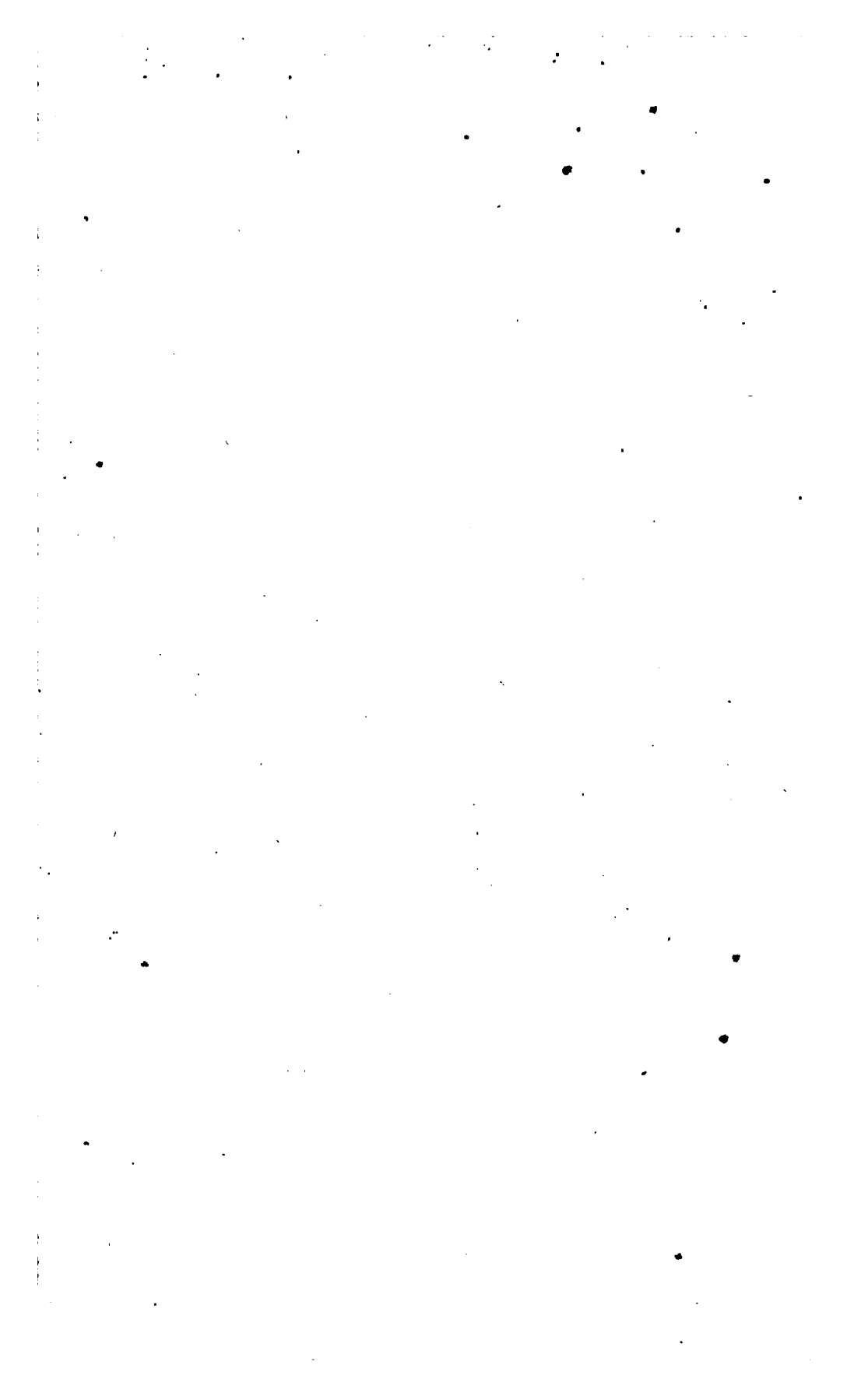
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PRECEDENTS.

I. BEGINNINGS AND CONCLUSIONS OF DECLARATIONS.*

I. IN THE KING'S BENCH

Markham and Le Blanc.

*Thursday next after fifteen days of St.
Hilary,(a) in Hilary Term, 47 Geo. III.*

MIDDLESEX, (to wit.) (b) *A B* complains of *C D*, being in the custody (c) of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea of *tres-

1. In assumpsit or case by bill or latitat.
* 2

(a) As to the title of the declaration in general, see vol. 1. chapter on Declarations—and 2 Saund. 1. n. 1. The declaration should in general be entitled of the term in which the writ is returnable, 3 T. R. 624. but when it is by the by, may be entitled of the term when it is delivered. Id. 627. and if there be several defendants who put in bail of different terms it should be entitled of the term of which the last bail was put in. Id. 1 Wils. 242. When the cause of action arose after the first day of the term in which the writ is returnable, the declaration should be enti-

tled specially of a subsequent day in that term, and it is always advisable in an action of assumpsit, case, or trespass, to entitle the declaration specially of the day it is delivered or filed, in order to admit of evidence of a promise, &c. after the first day of the term. 1 T. R. 116. 7 T. R. 4. 4 East, 75. But a declaration in *sci. fa.* may be entitled generally, 3 Wils. 154.

(b) As to the venue, see vol. 1. chapter on Declarations.

(c) This form is to be adopted whether the defendant be in the actual or supposed custody of the marshal.

* I have here only given one or two of the most usual forms in each court. For the great variety of these forms in different actions, and against particular persons, see the *Forms of Court*, &c. which I have lately published on a large single sheet.

VOL. II.

[1]

Beginnings, &c. of declarations. pass on the case, &c.(d) For that whereas, &c.(e) [*here set forth the cause of action, whether in assumpsit, case, or trover, and conclude as follows:*](f) To the damage of the said *A B* of —l. and therefore he brings his suit, &c.

Pledges(*g*) to prosecute, { John Doe,
and
Richard Roe.

Markham and Le Blanc.

*Thursday next after fifteen days of St.
Hilary, in Hilary Term, 47 Geo. III.(h)*

2. Against a prisoner in the actual custody of the sheriff, *Middlesex*, (to wit.) *A B* complains that *C D*, being in the custody of the sheriff of —, by virtue of a certain precept called a bill of *Middlesex*, (or “writ of our lord the king, called a *latitat*,”) issued out of the court of our said lord the king, before the king himself, against the said *C D*, in this suit, and returnable in the same court, on — next after —, in this same term : (i) of a plea of trespass on “the case, &c. for that” whereas, &c. [*here state the cause of action, and conclude as in the preceding precedent.*]

* 3

(d) In debt, covenant, &c. the form varies; see the sheet of forms of court, &c.

(e) A declaration by bill in trespass, stating, that *whereas*, or *wherefore*, the defendant did the act complained of, is bad on special demurrer, see vol. 1. chapter on Declarations. 1 Stra. 621. 2 Stra. 1151. 1162. but not so by original, or in C. P. when the writ is repeated, 1 Wils. 99. 2 Wils. 203.

(f) The conclusion in debt, *quidam*, runs as follows: “And therefore as well for our said lord the king,” (or “for the poor of the said parish of —,”) “as for himself in this behalf, he brings his suit,” &c. A common informer is not entitled to damages. 4 Burr. 2021. 2490. The

conclusion in trespass is as follows:

“— and other wrongs to the said *A B* then and there did, against the peace of our said lord the king, and to the damage of the said *A B* of —l. and therefore he brings his suit, &c. Pledges,” &c.

(g) The omission of pledges is not material. 3 T. R. 157.

(h) See ante, 1. n. (a) as to the title.

(i) As to this form, see vol. 1. title Declaration. In this case since the 4 & 5 W. & M. c. 21. s. 3. if the declaration do not shew at whose suit the defendant is in custody, it will be bad on general demurrer, 2 Lord Raym. 1362. 1 Wils. 119, 120. but this form is not necessary when the plaintiff has proceeded by special original, Imp. K. B. 618. Tidd, 311.

OF DECLARATIONS.

3

*Beginning,
&c. of decla-
rations.*

In the King's Bench.

*Thursday next after fifteen days of St.
Hilary, in Hilary Term, 47 Geo. III.(j)*

Middlesex, (to wit.) *C D* and *E F* were attached to answer *A B* of a plea of trespass on the case, &c. and thereupon the said *A B*, by *G H*, his attorney, comes and gives the court here to understand and be informed, that since the suing out of the original writ in this cause, and before this day, to wit, on, &c. the said *E F* was duly outlawed in the same court here in this suit, as by the record of the said outlawry remaining in the said court in full force, more fully appears; and hereupon the said *A B*, by his attorney aforesaid, complains against the said *C D*, in the plea aforesaid, for that whereas, &c. [*stating the promises by both the defendants.*]

3. When one of the defendants has been outlawed in the same action.

N. B. This declaration must be entitled after the outlawry is complete, 1 *Wils.* 78. 1 *East*, 133.—it must state an outlawry in the present suit, 3 *East*, 144.—but need not refer to the record of outlawry, 7 *East*, 50. As to the plea denying the outlawry, see 1 *East*, 133. 634.

II. IN THE COMMON PLEAS.

In the Common Pleas.

Hilary Term, 47 Geo. III.(k)

Middlesex, (to wit.) *C D(l)* was attached to answer *1 *B* of a plea of trespass on the case, &c.(m) and thereupon the said

* 4
4. In the
Common
Pleas.

(j) As to the title of this declaration, see ante, 1. n. (a), and the observation at the end of this precedent.

(k) As perhaps a common capias may be issued before the cause of action arose, as in *K. B.* see 1 *B. & P.* 342. 2 *B. & P.* 235. it may therefore be advisable to entitle the declaration specially, as in *K. B.* ante, 1. n. (a).

(l) The addition needs not be stated in the declaration, 3 *B. & P.* 395.

(m) As to the distinction between the words *attached and summoned*, and as to this short recital of the nature of the action, see 1 *Saund.* 318. n. 3.

*Beginnings,
&c. of decla-
rations.*

A B, by *E F*, his attorney, complains,⁽ⁿ⁾ for that whereas, &c.
[*here state the cause of action and conclude(o) as follows:*]
Wherefore the said *A B* saith that he is injured, and hath sus-
tained damage to the value of —*l.* and therefore he brings his
suit, &c.^(p)

Omit pledges.

III. IN THE EXCHEQUER.

In the Exchequer of Pleas.

Hilary Term, 47 Geo. III.

5. In the Ex-
chequer.

Middlesex, (to wit.) *A B*, a debtor to our sovereign lord
the now king, cometh before the barons of his majesty's Ex-
chequer, on —, the — day of —, in this same term, by *E*
F, his attorney, and complains by bill against *C D*, present here
in court the same day, of a plea of trespass on the case, &c.
(or as the form of action may be :) for that whereas, &c.
[*here set out the cause of action and conclude as follows:*] to the
damage of the said *A B* of —*l.* whereby he is the less able to
satisfy our said lord the king the debts (or if at the suit of an
executor or administrator, "the debts of the said *E F*,") which
he owes his majesty at his said Exchequer; and therefore he
brings his suit, &c.

Pledges to prosecute, { *John Doe,*
and
Richard Roe.

(n) The omission of these words, though untechnical, is not demurrable. 1 B. & P. 366.

(o) In debt, *qui tam*, the conclusion is as in K. B. omitting pledges. In trespass it runs as follows: "And other wrongs to the said *A B* then and there did, to the great damage of the said *A B*, and against the

peace of our lord the now king; wherefore the said *A B* saith that he is injured, and hath sustained damage to the value of —*l.* and therefore he brings his suit," &c.—
Omit pledges.

(p) This it is observable varies from the conclusion in K. B.

II. DECLARATIONS IN ASSUMPSIT.

I. COMMON COUNTS.

And whereas also (g) the said *C D*, afterwards, to wit, on the day and year last(r) aforesaid, in *London* aforesaid, in the parish and ward aforesaid, was indebted to the said *A B* in the further sum of —l. of like(s) lawful money, for, &c.

1. The usual form of the *indebitatus assumpsit* count.

[*Here the subject matter of the debt must be stated, as that the plaintiff had sold land or goods, to the defendant, or done work for him, or had lent money, &c. as in the following counts, 2 Saund. 330. n. 2. and, except in the counts for money had and received, it must be alleged that the debt was incurred at the defendant's request, 1 Saund. 264. n. 1. the count then proceeds as follows :*]

and at his special instance and request, and being so indebted, he the said *C D* in consideration thereof, afterwards, to wit, on the day and year last aforesaid, in *London* aforesaid, undertook, and then and there faithfully promised the said *A B* to pay him the said last mentioned sum of money, when he the said *C D* should be thereunto afterwards requested.

(g) If there be no special count preceding the first *indebitatus* count, the form immediately after the commencement of the declaration runs thus : For that whereas the said *C D* on the — day of —, in the year of our lord —, at —, in the county of —, was indebted," &c.

(r) If there be a special count preceding the *indebitatus* count, it is proper, especially in declarations on bills or notes, to insert in the com-

mon counts a day as recent as possible, with reference to the title of the declaration, so that the common breach may appear to be after the money payable by the bill, note, &c. was due.

(s) If the words "lawful money of Great-Britain" have not been before mentioned, here insert them instead of the words "like lawful money."

DECLARATIONS IN ASSUMPSIT.

The usual
form of the
quantum me-
ruit count. (t)

*And whereas also afterwards, to wit, on the day and year last aforesaid, in *London* aforesaid, in the parish and ward aforesaid, in consideration that the said *A B*, at the like special instance and request of the said *C D*, had before that time, &c.

[Here insert the subject matter of the debt as in the following counts, and then proceed as follows:]

he the said *C D* undertook, and then and there faithfully promised the said *A B* to pay him so much money* as he therefore reasonably deserved to have of the said *C D*, when he the said *C D* should be thereunto afterwards requested. And the said *A B* avers that he therefore reasonably deserved to have of the said *C D* the further sum of —*l.* of like lawful money, to wit, in *London* aforesaid, in the parish and ward aforesaid, whereof the said *C D*, afterwards, to wit, on the day and year last aforesaid, there had notice.

3. The usual
form of the
quantum va-
lebant count.
(u)

[Same as the above quantum meruit to the asterisk, and then proceed as follows:]

as the said last mentioned goods, wares, and merchandise, at the time of the said sale, and delivery thereof, were reasonably worth, when he the said *C D* should be thereunto afterwards requested. And the said *A B* avers, that the said last mentioned goods, wares, and merchandise, at the time of the said sale and delivery thereof were reasonably worth the further sum of —*l.* of like lawful money, to wit, in *London* aforesaid, in the parish and ward aforesaid, whereof the said *C D* afterwards, to wit, on the day and year last aforesaid, there had notice.

(t) As the plaintiff may recover on the indebitatus count, though no contract for a specific price be proved, the quantum meruit, or valebant count seems unnecessary, and where the declaration is otherwise long, should be omitted, 2 Saund. 122. n. (a).

(u) This count is not in practice adopted, except when the demand is for goods sold and delivered, or bargained and sold, and the quantum meruit count appears to be in all cases sufficient.

* I. RESPECTING REAL PROPERTY.

1. *Respecting real property.*

The indebitatus count is as ante, 5. inserting these words: "for a certain messuage or tenement and premises, with the appurtenances of the said A B, situate, lying and being in the parish of —, in the county of —, (w) before that time bargained, sold, and released (x) by the said A B to the said C D, and at his special instance and request. And being so indebted," &c. (Conclusion as ante, 5.) The quantum meruit thereon is as ante, 6. inserting as follows: "had before that time bargained, sold, and released to the said C D, a certain other messuage or tenement, and premises, with the appurtenances of the said A B, situate, &c. he the said C D undertook," &c. (Conclusion is as ante, 6.)

1. For a freehold estate sold and conveyed.

The indebitatus count is as ante, 5. inserting these words: "for certain messuages, lands, and tenements, with the appurtenances, situate, &c. (y) before that time bargained, sold, and surrendered, by the said A B to and for the said C D, and at his special instance, &c. And being so indebted," &c. (Conclusion as ante, 5.) The quantum meruit thereon is as ante, 6. inserting as follows: "had before that time bargained, sold, and surrendered to and for the said C D, certain other messuages, lands, and tenements, with the appurtenances, situate, &c. he the said C D undertook," &c. (Conclusion is as ante, 6.)

2. For a copyhold estate surrendered.

The indebitatus count is as ante, 5. inserting these words: "for certain messuages, lands, and tenements, with the appurtenances, situate, (z) &c. before that time bargained, sold, and assigned by the said A B to the said C D, and at his special instance and request, for the remainder of a certain term then to come and unexpired therein. And being so indebted," &c. (Conclusion as ante, 5.) The quantum meruit thereon is

3. For a leasehold estate sold and assigned.

* 8

(w) It is usual but unnecessary to state the situation, 6 East, 348. If misstated, the variance will be a ground of nonsuit, 1 Esp. Rep. 273.

(x) This allegation will depend on

the nature of the conveyance, as whether it were by lease and release, feoffment, &c.

(y) Ante, n. (w).

(z) Id. ibid.

1. *Respecting real property.* as ante, 6. inserting as follows: "had before that time bargained, sold and assigned certain other messuages, &c. with the appurtenances, situate, &c. for the remainder of a certain term of years then to come and unexpired therein, he the said C D undertook," &c. (Conclusion is as ante, 6.)

4. For the good-will of a public-house, and the plaintiff's business therein. *The indebitatus count is as ante, 5. inserting these words:* "for the good-will of a certain public-house, commonly called or known by the name or sign of —, situate, (a) &c. and the business of him the said A B of a victualler therein, before that time surrendered, relinquished, and given up by the said A B, to and in favour of the said C D, and at his special, &c. And being so indebted," &c. (a *quantum meruit* may be readily framed.)

5. For the use and occupation of a house or of a house and land. (c) * 9 *The indebitatus count is as ante, 5. inserting these words:* "for the use and occupation of a certain dwelling-house. (or "of a certain dwelling-house, buildings, and land,") with the appurtenances of the said A B, situate, &c. (d) by the said C D, and at his special instance and request, and by the sufferance and permission of the said A B for a long time then elapsed, had, held, used, occupied, possessed, and enjoyed. And being so indebted," &c. (Conclusion as ante, 5.) *The quantum meruit thereon is as ante, 6. inserting as follows:* "had before that time suffered and permitted the said C D to have, hold, use, occupy, possess and enjoy a certain other dwelling-house (or, 'a certain other dwelling-house, buildings and land')"

(a) Ante, 7. n. (w).

(c) This count is founded on 11 Geo. II. c. 19. s. 14. but the statute is not usually referred to in the declaration. It is unnecessary in debt or assumpsit for use and occupation to state where the premises lie, or any of the particulars of the demise, 6 East, 348. though the venue may be local when the demise was not to the defendant, the same as against the assignee of the leasee in covenant, 1 Saund. 241. n. 5. This count is sufficient though the defendant may not himself have occupied the premises, 8 T. R. 327. The defendant cannot plead nil habuit, 1 Wils. 314. 2 Wils.

208. and therefore it does not seem material to allege that the estate was the plaintiff's. Where there is an agreement under seal, for a lease not containing any covenant for the payment of rent, this action may be supported, 4 Esp. 58. If it be doubtful whether there be a demise under seal, it is advisable to declare in debt on demise, as in 1 Saund. 276. n. 1. 202; 203. 1 New Rep. 104. Ld. Raym. 1503. with a count in debt for use and occupation.

(d) It is not necessary or advisable to state the local situation, ante, 7. n. (w).

COMMON COUNTS.

9

with the appurtenances of the said *A B*, situate, &c. And that he the said *C D* had, according to the said last-mentioned sufferance and permission of the said *A B*, holden, used, occupied, possessed and enjoyed the same for a long space of time then elapsed, he the said *C D* undertook," &c. (Conclusion is as *ante*, 6.)

1. *Respecting real property.*

The indebitatus count is as ante, 5. *inserting these words* : " for that whereas the said *C D*, after the 24th of *June*, 1738, mentioned in a certain act of parliament made in the 11th year of the reign of his late majesty king *George II.* entitled, &c. (to wit,) on the 35th day of *March*, A. D. 1806, at, &c. by force of the statute in such case made and provided, became and was indebted to the said *A B* in a large sum of money, (to wit,) the sum of 10*l.* of lawful, &c. for the use and occupation of a certain messuage, with the appurtenances, situate, &c. on the 25th day of *December*, A. D. 1805, held by the said *C D* as tenant thereof to the said *A B*, at and under the yearly rent of 20*l.* payable quarterly by the said *C D*, and at his special instance, &c. for a long space of time, to wit, from the 25th *December*, A. D. 1805, till the said 25th *March*, A. D. 1806, had, used, occupied, possessed, and enjoyed, notwithstanding a certain notice theretofore given by the said *C D* to the said *A B*, of his intention to quit, and that he the said *C D* would quit and deliver up unto the said *A B*, the *said messuage, with the appurtenances, upon the said 25th *December*, A. D. 1805. And being so indebted," &c. (Conclusion as *ante*, 5.)

6. On 11 Geo. II. c. 19. s. 18. for double rent, tenant having neglected to quit in pursuance of his own notice.(c)

* 10

The indebitatus count is as ante, 5. *inserting these words* : " for the use of certain pasture land of the said *A B* and the eatage of the grass thereon growing, by him the said *A B* before that time let to the said *C D*, and at his special instance, &c. and by the said *C D*, according to such letting, had and used in and for the depasturing of certain cattle, for a long time before then elapsed, and being so indebted," &c. (Con-

7. For the use of pasture land and eatage of the grass.

(c) See a good precedent with notes, and a suggestion that the venue is local, 2 Wentw. 64, 65. The remedy when the landlord gives notice to quit is debt for double value, 4 Geo. II. c. 28. s. 1.

1. *Respecting real property.* elusion as ante, 5.) *The quantum meruit thereon is as ante, 6.* inserting as follows: "had before that time suffered and permitted the said *C D* to have and enjoy, and that the said *C D* had accordingly had and enjoyed certain other pasture land of him the said *A B*, and the eatage of certain grass thereon growing, in and for the depasturing of certain other cattle for a long time before then elapsed, he the said *C D* undertook," &c. (Conclusion is as ante, 6.)

8. *For the use and occupation of unfurnished lodgings.* *The indebitatus count is as ante, 5. inserting these words:* "for the use and occupation of certain rooms and apartments in and parcel of a certain dwelling-house of the said *A B*, situate, &c. (f) by the said *C D*, and at his special instance, &c. and by the sufferance and permission of the said *A B* for a long space of time before then elapsed, had held, used, occupied, possessed and enjoyed, (g) and being so indebted," &c. (Conclusion as ante, 5.) *The quantum meruit thereon is as ante, 6. inserting as follows:* "had before that time permitted the said *C D* to have, held, use, occupy, possess, and enjoy certain other rooms and apartments in, and parcel of a certain other dwelling-house of the said *A B*, situate, &c. and that he the said *C D* had, according to the said last-mentioned sufferance and permission had, holden, &c. the same for a long space *of time then elapsed, he the said *C D* undertook," &c. (Conclusion is as ante, 6.)

* 11

9. *For the use and occupation of furnished lodgings.* *The indebitatus count is as ante, 5. inserting these words:* "for the use and occupation of certain rooms and apartments in and parcel of a certain dwelling-house of the said *A B*, situate, &c. by the (h) said *C D*, and at his special instance, &c. and by the sufferance and permission of the said *A B* for a long space of time before then elapsed, had held, used, occupied, possessed and enjoyed, together with certain household furniture, table linen, and other necessities, goods and

(f) It is not necessary, nor advisable to state the local situation, ante, 7. n. (w). it is advisable to declare on the agreement.

(g) This count is sustainable though the defendant may have refused to occupy, though in such case (h) It is not necessary, nor advisable to state the local situation, ante, 7. n. (w).

chattels, of the said *A B* therein being, and being so indebted," &c. (Conclusion as *ante*, 5.) *The quantum meruit thereon is as ante*, 6. *inserting as follows*: "had before that time suffered and permitted the said *C D* to have, hold, use, occupy, possess and enjoy, certain other rooms and apartments in and parcel of a certain other dwelling-house, of the said *A B*, situate, &c. and that the said *C D* had, according to the last-mentioned sufferance and permission of the said *A B*, had holden, &c. the same together with certain other household furniture of the said *A B* therein being, for a long time before then elapsed, he the said *C D* undertook," &c. (Conclusion is as *ante*, 6.)

1. *Respecting real property.*

The indebitatus count is as ante, 5. *inserting these words*: "for certain rooms, apartments and furniture of the said *A B* before that time used and enjoyed by the said *C D* at his special instance, &c. and by the permission of the said *A B*, and for meat, drink, fire, candles, attendance and other necessaries, by the said *A B* before that time found and provided for the said *C D*, and at his like special, &c. and being so indebted," &c. (Conclusion as *ante*, 5.) *The quantum meruit thereon is as ante*, 6. *inserting as follows*: "had before that time permitted the said *C D* to use and enjoy, and that he the said *C D* had accordingly used and enjoyed certain other rooms, apartments *and furniture of the said *A B*, and also in consideration that the said *A B*, at the like special, &c. had before that time found and provided other meat, drink, fire, candles, attendance and necessaries, for the said *C D*, he the said *C D* undertook," &c. (Conclusion is as *ante*, 6.)

10. For board and lodging.

* 12

The indebitatus count is as ante, 5. *inserting these words*: "for warehouse room by the said *A B* before that time found and provided for, in and about the stowing, and keeping of certain goods and merchandise, before then stowed and kept in a certain warehouse of him the said *A B*, for the said *C D*, and at his special instance, &c. and being so indebted," &c. (Conclusion as *ante*, 5.) *The quantum meruit thereon is as ante*, 5. *in-*

11. For warehouse-room of goods.

1. *Respecting real property.* *serting as follows:* "had before that time found and provided other warehouse-room for, in and about the stowing and keeping of certain other goods and merchandise, before them stowed and kept in a certain other warehouse of him the said *A B*, for the said *C D*, he the said *C D* undertook," &c. (Conclusion is as *ante*, 6.)

12. For the standing of a chaise.

The indebitatus count is as ante, 5. *inserting these words:* "for the standing of a certain chaise by the said *A B* before that time kept and taken care of for the said *C D*, and at his special instance, &c. and being so indebted," &c. (Conclusion as *ante*, 5.) *The quantum meruit thereon is as ante*, 6. *inserting as follows:* "had before that time kept and taken care of a certain other chaise for the said *C D*, he the said *C D* undertook, &c. (Conclusion is as *ante*, 6.)

13. For the moorage of ships.⁽ⁱ⁾

* 13

The indebitatus count is as ante, 5. *inserting these words:* "for the mooring and fastening of a certain ship, or vessel called, &c. to a certain chain of the said *A B* lying and being in the river *Thames*, in the said county of *Middlesex*, for a long space of time then elapsed, moored and fastened *by the said *C D* to the said chain of the said *A B*, and by his permission and sufferance, and at the special, &c. of the said *C D*, and being so indebted," &c. (Conclusion as *ante*, 5.) *The quantum meruit thereon is as ante*, 6. *inserting as follows:* "had before that time at the like special, &c. of the said *C D*, permitted and suffered him to moor and fasten a certain other ship or vessel called —, to a certain other chain of him the said *A B* in the river *Thames* aforesaid, in the county aforesaid, and that the said *C D*, by virtue of such permission and sufferance, had before then moored and fastened the said last mentioned vessel to the said chain there for a long space of time then elapsed, he the said *C D* undertook," &c. (Conclusion as *ante*, 6.)

(i) For boorage, pilotage, buoys, assistant, 52, 53. For moorage, see and sea-marks, see Pleader's As- 3 Wentw. 69.

The indebitatus count is as follows: "For that whereas, the said *C D* on, &c. at, &c. being tenant of certain customary tenements, with the appurtenances, parcel of the manor of ———, was indebted to the said *A B*, then and still being lord of the said manor, in the sum of ——. of lawful, &c. for certain reasonable fines, duly assessed, due and payable from the said *C D* to the said *A B* for and on the admission of him the said *C D*, according to the usage and custom of the said manor, into the said customary tenements, with the appurtenances, to hold to him, his heirs, and assigns, of the lord of the said manor, at the will of the lord, according to the custom of the said manor, and being so indebted," &c. (Conclusion as ante, 5.) *No quantum meruit count is to be added.*

1. *Respecting real property.*

14. For fines on admission to copyhold. (k)

The indebitatus count is as ante, 5. inserting these words: "for divers tolls and duties due and of right payable by the said *C D* to the said bailiffs, &c. for the passage of divers loaded waggons, and loaded carts of the said *C D* before that time drawn over a certain bridge, situate, &c. which said bridge the said bailiffs, &c. and their predecessors by their said *several names of incorporation from time, whereof, &c. have from time to time, repaired and supported, and have been used and accustomed to repair and support, and being so indebted," &c. (Conclusion as ante, 5.) *No quantum meruit count is to be added.*

15. For tolls on loaded carriages passing over a bridge. (l)

* 14

The indebitatus count is as ante, 5. inserting these words: "for toll due and of right payable by the said *C D* to the said mayor and burgesses, &c. for weighing at a certain beam of them the said mayor and burgesses, divers goods, wares and merchandise of the said *C D* before that time brought by the said *C D* to the said market of and in the said borough,

16. For toll on goods brought to market and weighed in plaintiff's beam. (m)

(k) This general count is sufficient, 1 T. R. 618, 619. 3 B. & P. 346. 1 B. & P. 102. 2 Doug. 727. 6 East, 36.

(l) This general count is sufficient, 1 T. R. 616.

(m) As to this count, 4 T. R. 104. and when the plaintiff must declare specially, see 6 East, 436.

1. *Respecting real property.* to be there sold, and by the said mayor and burgesses, at the special instance and request of the said *C D*, weighed at the said beam, and being so indebted," &c. (Conclusion as *ante*, 5.) *No quantum meruit count is to be added.*

17. For tolls due for having brought into a market live cattle and sold therein, at the suit of the farmer. *The indebitatus count is as ante, 5. inserting these words:* "for divers reasonable tolls before that time and then due, and of right payable by and from the said *C D* to the said *A B*, as the farmer and proprietor of a certain market called the cattle market, situate, &c. and of the dues, duties, tolls, and privileges thereto belonging and growing and arising thereby and therefrom, for a certain time now elapsed, for and in respect of his the said *C D*, having whilst he the said *A B* was such farmer and proprietor as aforesaid; brought into the said market and sold therein divers live cattle, to wit, bullocks, bulls, oxen, cows, heifers and calves, and being so indebted, he the said *C D*, in consideration," &c. (Conclusion as *ante*, 5.) *No quantum meruit count is to be added.*

18. Second indebitatus count for same tolls. *The indebitatus count is as ante, 5. inserting these words:* "for divers other tolls and duties before that time and then due, and of right payable by and from the said *C D* to the said *A B*, for and in respect of his the said *C D* having brought into the said market and sold therein divers other live cattle to wit, &c. (as before,) and being so indebted," &c. (Conclusion as *ante*, 5.)

§ 15

19. By the farmer for tolls due for passing through a turnpike gate. (n) *The indebitatus count is as ante, 5. inserting these words:* "for divers tolls before that time due and payable by the said *C D* to the said *A B*, as farmer and renter, duly made and appointed, according to the form of the statute in such case made and provided, of the tolls due and payable, according to the form of the statute in such case made and provided, at a certain turnpike-gate at —, duly erected and placed upon a certain turnpike road, and at certain cranes, engines,

(n) N. B. This, though on a local See 1 Weptw. 189.
act, will serve as a general precedent.

and weighing machines also erected upon and near to the said turnpike road, according to the form of the statute in that case made and provided :” [or instead of the preceding statement say “constituted and appointed according to the form of the statute in such case made and provided, of the tolls due and payable for carriages and cattle travelling upon a certain turnpike road in the county of —, and through a certain gate erected upon the said road, according to the form of the said statute ;”] “for divers cattle and carriages of the said *C D* which before that time had travelled upon the said turnpike road, and through the gate aforesaid, and for divers other carriages of the said *C D* which had before that time travelled upon the said turnpike road, and had been weighed at the said cranes, engines, and weighing machines, and being so indebted,” &c. (Conclusion as *ante*, 5.) *No quantum meruit count is to be added.*

1. *Respecting real property.*

The indebitatus count is as ante, 5. inserting these words : “for divers other tolls and duties before that time due and of right payable by the said *C D* to the said *A B*, for divers other cattle and carriages of the said *C D* which before that time had travelled upon a certain other turnpike road, of which said last-mentioned tolls and duties the said *A B* was then and there renter and collector in that behalf *duly constituted and appointed, and being so indebted,” &c. (Conclusion as *ante*, 5.) *No quantum meruit count is to be added.*

20. *Second indebitatus count thereon.*

* 16

The indebitatus count is as ante, 5. inserting these words : “for so much money due and payable to the said mayor, &c. for petty customs, for divers goods, wares, and merchandise, by the said *C D* before that time imported into the port of —, and being so indebted,” &c. (Conclusion as *ante*, 5.)

21. *Petty customs.*

II. *Respecting personal property.*

22. For goods sold and delivered to the defendant.

II. *RESPECTING PERSONAL PROPERTY.*

The indebitatus count is as ante, 5. inserting these words: "for divers goods, wares, and merchandise, (o) by the said A B before that time sold and delivered to the said C D, and at his special instance and request, (p) and being so indebted," &c. (Conclusion as ante, 5.) The quantum valebant thereon is as ante, 6. inserting as follows: "had before that time sold and delivered divers other goods, wares and merchandise, to the said C D, he the said C D undertook and then and there faithfully promised the said A B to pay him so much money as the said last-mentioned goods, wares, and merchandise, at the time of the said sale and delivery thereof were reasonably worth, (q) when he the said C D should be thereunto afterwards requested. And the said A B avers, that the last-mentioned goods, wares, and merchandise, at the time of the said sale and delivery thereof were reasonably worth the further sum of —l. of like lawful money, to wit, at, &c. aforesaid, whereof the said C D afterwards, to wit, on, &c. aforesaid, there had notice."

* 17

23. For goods bargained and sold to the defendant, and delivered to a third person. (d)

** The indebitatus count is as ante, 5. inserting these words: "for divers goods, wares, and merchandise; by the said A B before that time bargained and sold to the said C D, and under and by virtue of that bargain and sale delivered to one E F, at the special instance, &c. of the said C D. And being so indebted," &c. (Conclusion as ante, 5.) The quantum meruit thereon is as ante, 6. inserting as follows: "had before that time bargained and sold with divers other goods, &c. to the said C D, and had under and by virtue of the said last-mentioned bargain and sale delivered the same to the said E F, he the said C D undertook," &c. (Conclusion as ante, 6.)*

(o) It is not necessary to say "of the plaintiff," Bull. N. P. 139. and those words should be omitted if the action be at the suit of a broker, factor, &c. 5 Esp. 31, 32.

(p) As the term "sale" implies a contract, perhaps the omission of the words, "at the special instance and request of the defendant," would not be material, 2 T. R. 30.

(q) This count is not available

where there has been a contract for a sum certain, 5tra. 648. See ante, 6.

(d) This count though usual, is not necessary; the delivery may be stated to have been to the defendant, 8 T. R. 328. 5tra. 127. *sed vide* Bull. N. P. 136. If the defendant be sued on a collateral liability to pay for goods sold to another, the count must be special, 1 Saund. 211. b.

The indebitatus count is as ante, 5. inserting these words: "for divers goods, wares, and merchandise, by the said A B before that time bargained and sold to the said C D and at his special instance, &c. And being so indebted," &c. (Conclusion as ante, 5.) The quantum meruit thereon is as ante, 6. inserting as follows: "had before that time bargained and sold to the said C D divers other goods, wares, and merchandise, he the said C D undertook," &c. (Conclusion as ante, 6.)

11. *Respecting personal property.*

24. For goods bargained and sold to defendant generally. (c)

The indebitatus count is as ante, 5. inserting these words: "for a certain crop of grass, (or "turnips,") of the said A B, before that time bargained and sold by the said A B to the said C D, and at his special instance, &c. and by the said C D under and by virtue of that bargain and sale before that time accepted, mowed, cut down, (or if for a crop of turnips, "accepted, gathered,") had taken and carried away. And being so indebted," &c. (Conclusion as ante, 5.) The quantum meruit thereon is as ante, 6. inserting as follows: "had before that time bargained and sold to the said C D a certain other crop of grass (or "turnips") of the said A B, and that the said C D had under and by virtue of the said bargain and sale accepted, mowed, and cut down the last mentioned crop of grass; (or if for a crop of turnips, "accepted and gathered the said last-mentioned crop of turnips," and had taken and carried away the same, he the said C D undertook," &c. (Conclusion as ante, 6.)

25. For a crop of grass or turnips, &c. bargained and sold. (f)

* 18

The indebitatus count is as ante, 5. inserting these words: "for certain tithes of the said A B, to wit, tithes of corn, wheat,

26. For tithes bargained and sold. (g)

(e) This count is proper where there has not been an actual delivery of the goods, 1 East, 194. 1 Ves. jun. 530. It is usual, though not absolutely necessary, to declare specially, 4 Esp. Rep. 251. What is a delivery, see 3 B. & P. 582. Peake, 56. Bull. N. P. 36.

(f) A sale of a growing crop of grass is within the statute of frauds, 29 Car. II. c. 3. s. 4. 6 East, 603. As to this count, see 1 B. & P. 397.

(g) As to this count, 1 Lev. 141. Sid. 323. as the evidence, 4 T. R. 366, 367. This action is not sustainable unless there be evidence of a composition in lieu of tithes: If such evidence be doubtful, the declaration should be in debt, on the statute, for not setting out the tithe with a count in debt, for tithes bargained and sold, see Bull. N. P. 188 to 191.

II. Respecting personal property.

barley, peas, and beans, &c. &c. issuing and arising from and out of certain lands in the occupation of the said *C D*, by the said *C D* before that time at his special instance and request, and by the permission of the said *A B* received, taken and retained, to his the said *C D*'s own use. And being so indebted," &c. (Conclusion as *ante*, 5.) *The quantum meruit thereon is as ante*, 6. *inserting as follows*: "had before that time at his like special instance and request, and by the sufferance and permission of the said *A B* received, taken, and retained, certain other tithes of the said *A B*, to wit, &c. arising, &c. he the said *C D*," &c. (Conclusion as *ante*, 6.)

§7 The like in another form.

* 19

The indebitatus count is as ante, 5. *inserting these words*, "for certain tithes arising, growing, renewing, and happening *upon and from certain lands of the said *C D*, situate, lying, and being at, &c. and due and of right payable to the said *A B* as rector of the rectory of the parish church of, &c. aforesaid; (or, "as farmer and proprietor thereof,") by the said *A B*, before that time bargained and sold to the said *C D*, and at his special instance, &c. and by the said *C D*, according to that bargain and sale, had taken and retained to and for his own proper use and benefit. And being so indebted," &c. (Conclusion as *ante*, 5.) *The quantum meruit thereon is as ante*, 6. *inserting as follows*: "had before that time bargained and sold to the said *C D* certain other tithes arising, &c. and due and of right payable to the said *A B*, as rector of the rectory aforesaid; (or "as farmer and proprietor thereof,") and that the said *C D* had, according to such last mentioned bargain and sale, taken and retained the said last mentioned tithes to and for his own proper use and benefit, he the said *C D* undertook, &c. to pay him so much money as the said last mentioned tithes, at the time of taking and detaining the same by the said *C D*, were reasonably worth, when, &c. And the said *A B* avers," &c. (add account stated and common conclusion.)—N. B. When the plaintiff's title is doubtful add two counts, for "certain tithes, goods, and merchandise, bargained and sold, without stating where they grew, or that plaintiff is proprietor thereof." (Conclusion as *ante*, 6.)

The indebitatus count is as ante, 5. inserting these words: *II. Respecting personal property.*
 "for meat, drink, washing, lodging, and other necessities by the said *A B* before that time found and provided for the said *C D*, and at his special instance, &c. and being so indebted," &c. (Conclusion as ante, 5.) *The quantum meruit thereon is as ante, 6. inserting as follows:* "had before that time found and provided other meat, drink, washing, lodging, and necessities for the said *C D*, he the said *C D* undertook," &c. (Conclusion as ante, 6.) *28. For necessities found and provided for defendant.*

**The indebitatus count is as ante, 5. inserting these words:* *29. For necessities found and provided for third persons. (h)*
 "for meat, drink, washing, lodging, and other necessities, by the said *A B* before that time found and provided, at the special instance, &c. for one *E F*, (or "for divers persons.") And being so indebted," &c. (Conclusion as ante, 5.) *The quantum meruit thereon is as ante, 6. inserting as follows:* "had before that time found and provided other meat, drink, &c. for the said *E F*, (or "for divers other persons,") he the said *C D* undertook," &c. (Conclusion as ante, 6.)

The indebitatus count is as ante, 5. inserting these words: *30. For horsemeat and stabling.*
 "for horsemeat, stabling, care and attendance, by the said *A B* before that time found, provided, and bestowed, for, in, and about the feeding and keeping of divers horses, mares, and geldings, of and for the said *C D*, and at his special instance, &c. And being so indebted," &c. (Conclusion as ante, 5.) *The quantum meruit thereon is as ante, 6. inserting as follows:* "had before that time found, provided, and bestowed, other horsemeat, stabling, care and attendance, for, in, and about the feeding and keeping of divers other horses, mares, and geldings, of and for the said *C D*, he the said *C D* undertook," &c. (Conclusion as ante, 6.)

The indebitatus count is as ante, 5. inserting these words: *31. For the agistment of cattle.*
 "for the agisting, depasturing, and feeding of divers cattle, by the said *A B* before that time agisted, depastured, and

(h) As to the necessity for this Bull. N. P. 136.
 count. See Stra. 127. 8 T. R. 328.

II. *Respecting personal property.*

fed, in certain pastures of him the said *A B*, for the said *C D*, and at his special instance, &c. And being so indebted," &c. (Conclusion as *ante*, 5.) *The quantum meruit thereon is as ante*, 6. *inserting as follows*: "had before that time agisted, depastured, and fed divers other cattle in certain other pastures of him the said *A B* for the said *C D*, he the said *C D* undertook," &c. (Conclusion as *ante*, 6.)

* 21

32. For the hire of horses and carriages, or ships, goods, &c. (i)

**The indebitatus count is as ante*, 5. *inserting these words*: "for the use and hire of divers horses, mares, and geldings, bridles, saddles, and harness, and of divers chaises, and other carriages, (or "of certain lighters and other vessels;" or "of certain plate, linen, china, furniture, goods and chattels,") by the said *A B* before that time let to hire and delivered to the said *C D*, and at his special instance, &c. and by the said *C D* under and by virtue of that letting to hire before then had and used. And being so indebted," &c.—(Conclusion as *ante*, 5.) *The quantum meruit thereon is as ante*, 6. *inserting as follows*: "had before that time let to hire and delivered to him the said *C D*, divers other horses, mares, and geldings, bridles, saddles, and harness, and divers other chaises and carriages; (or "certain other lighters and other vessels;" or "certain plate, linen, china, furniture, goods and chattels,") and that the said *C D* had, under and by virtue of the said last-mentioned letting to hire before then had and used the same, he the said *C D* undertook," &c. (Conclusion as *ante*, 6.)

33. For freight, primage, average and attendance. (j)

The indebitatus count is as ante, 5. *inserting these words*: "for certain freight, primage, and average before that time,

(i) As to this count, see 1 Com. Rep. 116. Lil. Ent. 28.

(j) This is the usual form, but it seems less subject to variance to say, "in and on board of divers ships and vessels, for the said *C D*, and at his request;" without stating the name of the ship, voyage, &c. See Abbott, 1 edit. 256. As to this count, and when the declaration should be special, see 2 B. & P. 323. If there be

a charter-party or contract under seal, in general the declaration must be on the deed, 1 New Rep. 104. when not, see Abbott, 1 edit. 258. &c. If the demand be for freight only, erase the words primage and average; if for average only, erase the words freight and primage. See a count for average, 1 East, 220. For average no *quantum meruit* is added.

and then due and payable from the said *C D* to the said *A B*, upon, for, and in respect of the carriage and conveyance of certain goods and merchandise by the said *A B* before that time, carried and conveyed in and on "board of a certain ship or vessel, called, &c. whereof the said *A B* was master, from, &c. to, &c. and there, to wit, at, &c. delivered to the said *C D* and at his special instance, &c. and for the care and attendance of the said *A B*, in and about the loading and unloading of the said goods and merchandise, and the delivery thereof as aforesaid." (Conclusion as *ante*, 5.) *The quantum meruit thereon is as ante*, 6. *inserting as follows*: "had before that time, carried and conveyed certain other goods and merchandise in and on board the said ship or vessel, called, &c. whereof the said *A B* was master, from, &c. aforesaid, to &c. aforesaid, and there, to wit, at, &c. aforesaid, had delivered the same to the said *C D*, and had bestowed other his care and attendance, in and about the loading and unloading of the said last-mentioned goods and merchandise, and the delivery thereof as aforesaid, he the said *C D* undertook," &c. (Conclusion as *ante*, 6.)

11. *Respecting personal property.*

* 22

The indebitatus count is as ante, 5. *inserting these words*: "for the tonnage of divers goods, wares, and merchandise of the said *C D*, by him the said *A B*, before that time, carried and conveyed upon divers parts of a certain cut or canal, navigable and passable from, &c. to, &c. in certain boats, barges, and other vessels for the said *C D*, and at his special instance, &c. and being so indebted," &c. (Conclusion as *ante*, 5.) *The quantum meruit thereon is as ante*, 6. *inserting as follows*: "had before that time, carried and conveyed divers other goods, wares, and merchandise of him the said *C D*, upon divers other parts of the said cut or canal, in certain other boats, barges, and vessels, for him the said *C D*, he the said *C D* undertook, &c. to pay him so much money, as he therefore reasonably deserved to have for the tonnage thereof." (Conclusion as *ante*, 6.)

34. For the tonnage of goods. (k)

H. Respecting personal property.

35. For a passage on board a ship.

* 23

The indebitatus count is as ante, 5. inserting these words :

"for the passage of the said *C D*, (or "of divers, to wit—
"seamen, before then carried and conveyed by the said *A B*,")
in and on board of a certain ship or vessel, called, &c. where-
of the said *A B* was master and commander, from, &c. to,
&c. and being so indebted," &c. (Conclusion as *ante*, 4.)—

The quantum meruit thereon is as ante, 6. inserting as follows :

"had before that time carried and conveyed the said *C D* (or
"divers, to wit—other seamen") in and on board of the said
ship or vessel, called, &c. whereof the said *A B* was master
and commander, from, &c. aforesaid, to, &c. aforesaid, he the
said *C D* undertook," &c. (Conclusion as *ante*, 6.)

36. For de-
murrage. (1)

The indebitatus count is as ante, 5. inserting these words :

"for the use of a certain ship or vessel, called, &c. whereof
the said *A B* was master by the said *C D*, before that time re-
tained, and kept on demurrage, with certain goods and mer-
chandise on board thereof, for a long time before then elapsed,
and at the special instance, &c. and being so indebted," &c.
(Conclusion as *ante*, 5.) *The quantum meruit thereon is as ante*,
6. *inserting as follows :* "had before that time suffered and
permitted the said *C D* to retain and keep, and that he the
said *C D* had accordingly retained and kept the said ship or
vessel, called, &c. whereof the said *A B* was master, with
certain other goods and merchandise on board thereof on de-
murrage for a long time before then elapsed, he the said *C D*
undertook," &c. (Conclusion as *ante*, 6.)

37. For light-
erage.

* 24

The indebitatus count is as ante, 5. inserting these words :

"for the lighterage of divers goods, wares, and merchandise,
by the said *A B*, before that time carried and conveyed "in cer-
tain lighters and other vessels of the said *A B*, and by him the
said *A B* shipped and landed from and out of the same for the

(1) As to demurrage, see Abbott tract for demurrage, the declaration should be special on the implied contract, to ship or unship the goods in a reasonable time.
New Rep. 104. If there be no con- 6

said *C D*, and at his special instance," &c. (Conclusion as *ante*, 5.) *The quantum meruit thereon is as ante*, 6. inserting as follows: "had before that time carried and conveyed divers other goods, &c. in certain other lighters, and other vessels of the said *A B*, and had unshipped and landed the same from and out of the same ships and other vessels for the said *C D*, and at his like special, &c. he the said *C D* undertook," &c. (Conclusion as *ante*, 6.)

II. Respecting personal property.

The indebitatus count is as ante, 5. inserting these words: "for the lightorage, wharfage, and warehouse-room of divers goods, wares, and merchandise by the said *A B*, before that shipped and landed in and by certain lighters and other vessels of him the said *A B*, and deposited and kept in and upon a certain wharf, and certain warehouses and premises of the said *A B* for the said *C D*, and at his special instance. &c. and being so indebted," &c. (Conclusion as *ante*, 5.) *The quantum meruit thereon is as ante*, 6. inserting as follows: "had before that time shipped and landed divers other goods, &c. in and by certain other lighters and vessels of him the said *A B*, and had deposited and kept the same in and upon a certain other wharf and certain other warehouses and premises of the said *A B* for the said *C D*, he the said *C D* undertook," &c. (Conclusion as *ante*, 6.)⁽ⁿ⁾

38. For lightorage, wharfage, and warehouse-room.
(m)

The indebitatus count is as ante, 5. inserting these words: "for the good-will of a certain business of him the said *A B*, before then relinquished and given up by the said *A B* to, and in favour of the said *C D*, and at his special instance, &c. and being so indebted," &c. (Conclusion as *ante*, 5.) *The quantum meruit thereon is as ante*, 6. inserting as follows: "had before that time relinquished and given up to and in favour of the said *C D*, a certain other business of him the said *A B*, he the said *C D* undertook," &c. (Conclusion as *ante*, 6.)

* 25

(m) This form may be easily applied to a demand for wharfage, or for warehouse-room only.

and sea-marks, see Pleadings Assistant, 52, 53. For moorage, see 3 Wentw. 69. and *ante*, 12.

(n) For boomage, pilotage, buoys,

II. Respecting personal services.

III. RESPECTING PERSONAL SERVICES.

FIRST—WAGES.

40. For wages as a hired servant.

The indebitatus count is as ante, 5. inserting these words :
 “ for the wages or salary of the said *A B* before that time, and then due and payable from the said *C D* to the said *A B* for the service of the said *A B* by him before then done and performed, as the hired servant of and for the said *C D*, and on his retainer, and being so indebted,” &c. (The conclusion is as *ante*, 5.) If the service has been performed on board a ship, add these words : “ in and on board a certain ship or vessel called —.”

N. B. The demand for wages being specific, no quantum meruit is added ; but it is usual to add two counts for work and labour generally. If the defendant have refused to employ the plaintiff, the declaration should be special for not employing. 2 East, 145.

41. For wages as a sailor, against the captain, or owner.

The indebitatus count is as ante, 5. inserting these words :
 “ for the wages of the said *A B* before that time, and then due and payable from the said *C D* to the said *A B* for the service of the said *A B* before then done and performed as a mariner of and belonging to a certain ship or vessel, called —, whereof the said *C D* during the time of such service was master and commander, and for the said *C D* and on his retainer. And being so indebted,” &c. (Conclusion as *ante*, 5.)
 [N. B. If it be against the owner of the ship say, “ a certain ship or vessel of the said *C D* *called —,” and omit the words in italics. The observation at the foot of the last precedent here applies.]

* 26

42. For wages as a ship steward or mate against the captain.

The indebitatus count is as ante, 5. inserting these words :
 “ for the wages or salary of the said *A B* before that time, and then due and payable from the said *C D* to the said *A B* for the service of the said *A B* by him before that time done and performed, as the steward of the said *C D* for a long time before then elapsed, in and on board of a certain ship or vessel,

called, &c. whereof the said *C D* was, for and during all that time, master and commander, and for the said *C D* and on his retainer. And being so indebted," &c. (Conclusion as *ante*, 5.) N. B. If at the suit of the *mate*, instead of the words in *italics*, insert "mate of." See *ante*, 25.

*III. Respect-
ing personal
services.*

The indebitatus count is as ante, 5. inserting these words : "for the wages of the said *A B* and for his service before then done and performed by him the said *A B*, as master and commander of a certain ship or vessel, called, &c. for the said *C D* and on his retainer. And being so indebted," &c.(o) (Conclusion as *ante*, 5.)

43. For wages
as captain a-
gainst the
owner.

The indebitatus count is as ante, 5. inserting these words : "for certain prize-money, wages, salary and reward, before that time, and then due, and payable from the said *C D* to the said *A B* for the service of the said *A B*, before that time done and performed by him the said *A B* as quarter-master on board a certain ship or vessel of the said *C D*, called, &c. on the retainer, and at the special instance and request of the said *C D*. And being so indebted," &c.(p) (Conclusion as *ante*, 5.)

44. For prize-
money, wa-
ges, &c. by a
quarter-mas-
ter against
the owner.

The indebitatus count is as ante, 5. inserting these words : "for the pay or salary of the said *A B* before that time, *and then due and payable from the said *C D* to the said *A B*, for the services of the said *A B*, before then done and performed by him the said *A B*, as quarter-master of a certain corps, called, &c. for the said *C D* and at his special, &c. And being so indebted," &c.(q) (Conclusion as *ante*, 5.)

45. For salary
as quarter-
master of a
corps of
troops.
* 27

The indebitatus count is as ante, 5. inserting these words : "for certain pilotage and reward before that time, and then due and payable from the said *C D* to the said *A B* for the pilotage, mooring and unmooring of a certain ship or vessel of the said *C D* by the said *A B* before then piloted, moored, and unmoored, for the said *C D* and on his retainer. And being so indebted," &c.(r) (Conclusion as *ante*, 5.)

46. For pilot-
age.

(o) See observation, *ante*, 25.

(p) See observation, *ante*, 25.

(q) See observation, *ante*, 25.

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(r) See observation, *ante*, 25.
Pleader's Assistant, 52, 53.

III. *Respecting personal services.* The *indebitatus count* is as *ante*, 5. inserting these words :
 47. For crimp- " for certain crimpage and reward before that time, and then
 age. due and payable from the said *C D* to the said *A B*, upon and
 for the procuring, raising and shipping of certain seamen by
 the said *A B* before that time procured, raised and shipped,
 in and on board of a certain ship or vessel called, &c. for the
 said *C D* and on his retainer. And being so indebted," &c.(s)
 (Conclusion as *ante*, 5.)

48. For sal- The *indebitatus count* is as *ante*, 5. inserting these words :
 vage. " for the salvage of a certain anchor and cable, by him the said
A B before that time saved for and delivered to the said
C D. And being so indebted," &c.(t) (Conclusion as
ante, 5.)

* 28

*SECONDLY—FEES.

49. For work The *indebitatus count* is as *ante*, 5. inserting these words :
 and labour as " for the work and labour, care, diligence and attendance of
 an attorney in the said *A B* by him the said *A B* before that time done, per-
 prosecuting formed and bestowed, as the attorney and solicitor of and for the
 and defending suits, and for the said *C D*, and upon his retainer in and about the prosecuting,
 fees, &c. and defending, and soliciting of divers causes, suits, and businesses
 deeds, and for for the said *C D*, and for *certain fees* due and of right payable
 journeys, &c. to the said *A B* in respect thereof. And also for other the work
 (w)

(s) *Ante*, 25.

(t) See note, *ante*, 25. In the case of salvage from the perils of the sea, the statutes have not taken away the common law remedy. See Abbott, 1 edit. 331. 3 B. & P. 612. and the precedent there; but in the case of *recapture*, as the admiralty has peculiar jurisdiction over prize causes, see 2 Doug. 594. &c. the 33 Geo. III. c. 66. s. 42. renders it necessary for the recaptor, to resort to that court.

(w) This form will suffice in all cases by an attorney against his client,

adding two counts for work and labour generally, and the money counts : where there was no suit carried on, or no deeds prepared, &c. or no journeys taken, the parts of this form not applicable to the case should be omitted. If the suit were carried on for a third person at the defendant's request, this count, with little alteration, will suffice, 2 Show. 421. But if the defendant be liable in respect of a collateral undertaking in writing, the declaration must be special, 1 Saund. 211. b.

and labour, care, diligence and attendance, of the said *A B* before that time done, performed, and bestowed, in and about the drawing, copying, and engrossing of divers conveyances, deeds, and writings for the said *C D*, and in and about other the business of the said *C D* and for the said *C D*, and at his special instance, &c. And also for divers journies and other attendances by the said *A B* before then made, performed and given, in and about other the business of the said *C D* and for the said *C D*, and at his like special, &c. and being so indebted," &c. (Conclusion as *ante*, 5.)

III. Respecting personal services.

The quantum meruit on this count is as ante, 6. inserting as follows: "had before that time done, performed, bestowed and given, other his work and labour, care, diligence and attendance as the attorney and solicitor of and for the said *C D*, and upon his retainer, in and about the prosecuting, defending and soliciting of divers others causes, suits and businesses, for the said *C D*, and had also at the like special, &c. before *that time done, performed and bestowed, other his work and labour, care, diligence and attendance, in and about the drawing, copying and engrossing of divers other conveyances, deeds, and writings, for the said *C D*, and in and about other the business of the said *C D*, and for the said *C D*. And had also at the like special, &c. before that time made, performed and given, divers other journies and attendances in and about other the business of the said *C D*, and for the said *C D*, he the said *C D* undertook," &c.

* 29

The indebitatus count is as ante, 5. inserting these words: "for the work and labour, care, diligence and attendance of the said *A B*, as a solicitor, and also as one of the sworn clerks of *E F*, esq. one of the six clerks of his majesty's high court of chancery, at *Westminster*, in the county of *Middlesex*, before that time done, performed and bestowed, by the said *A B*, upon the retainer, and at the special instance and request of the said *C D*, in and about the prosecuting, defending and soliciting of divers causes, suits and businesses, in the said court, for the said *C D*, and for certain fees due and of right payable to the said *A B*, in respect thereof. And being so indebted," &c. (Conclusion as *ante*, 6.) *The quantum meruit thereon is as ante, 6.*

50. As one of the sixty clerks in the Court of Chancery.

III. Respecting personal services.

inserting as follows : " had before that time done, performed and bestowed other his work and labour, care and diligence as such solicitor and sworn clerk as aforesaid, in and about the prosecuting, defending and soliciting of divers other causes, suits and businesses, in the said court of chancery, for the said C D, he the said C D undertook," &c. (Conclusion as ante 6.)

51. As a proctor in prosecuting an appeal to the high court of delegates. (x)

* 30

The indebitatus count is as ante 5. inserting these words : " for the work and labour, care, diligence and attendance of the said A B, by him the said A B before that time done, performed and bestowed, as the proctor of and for the said C D, and upon his retainer, in and about the prosecuting of an appeal from a sentence pronounced by the Arches court of Canterbury, to the high court of delegates, and in and about other the business of the said C D, and for the said C D, and at his special, &c. and also for fees due, and of right payable from the said C D to the said A B in respect thereof, and being so indebted," &c. (Conclusion as ante, 5.) *The quantum meruit thereon is as ante, 6. inserting as follows* : " had before that time done, performed and bestowed, other his work and labour, care, diligence and attendance as the proctor of and for the said C D, and upon his like retainer in and about the prosecuting a certain other appeal from a sentence pronounced by the said Arches court of Canterbury, to the said high court of delegates, and in and about other the business of the said C D, and for the said C D, and at his like special, &c. he the said C D undertook, &c. (Conclusion as ante, 6.)

52. By an agent against another attorney.

The indebitatus count is as ante, 5. inserting these words : " for the work and labour, care and diligence of the said A B, by him the said A B before that time done, performed and bestowed, for the said C D, as the agent of the said C D, and upon his retainer, and at his special, &c. in and about the prosecuting and defending of divers suits in law and equity, for the said C D, and for fees due, and of right payable to the said A B in that respect, and in and about the drawing and engrossing of divers deeds and writings for the said C D, and at his like, &c. and also for other work and labour, care, diligence and at-

attendance of the said *A B*, by him before that time done, performed, and bestowed for the said *C D*, and at his request, and also for divers journies and attendances by the said *A B*, before that time taken, made and performed, for the said *C D*, and at his like, &c. and being so indebted, &c. (Conclusion as *ante*, 5.) Add a *quantum meruit* adapted to the first count—two counts for work and labour generally, and the money counts.

III. *Respecting personal services.*

* 31

The indebitatus count is as ante, 5. inserting these words: "for certain fees, perquisites, and sums of money, before that time due and owing, and of right payable from the said *C D* to the said *A B*, as a bailiff to the sheriff of the county of —, upon and for the execution of divers writs, precepts and processes, for the said *C D*, at his special instance and request. And also upon and for the work and labour, trouble, care, diligence, journies and attendance of the said *A B*, as such bailiff as aforesaid, by him before that time done, performed and bestowed, in and about the executing and serving of the said writs, precepts and processes, and in and about the conducting, guarding and keeping of divers persons arrested by him the said *A B*, for the said *C D*, under and by virtue of the said writs, precepts, and processes, at the like special instance and request of the said *C D*. And being so indebted," &c. (Conclusion as *ante* 5.) [Add two counts for work and labour generally—money paid—had and received—account stated—and breach.]

53. As a sheriff's officer, bailiff, &c.

THIRDLY—FOR SERVICES IN GENERAL.

The indebitatus count is as ante, 5. inserting these words: "for the work and labour, care and diligence of the said *A B*,

54. For work and labour, and materials (9)

(9) When the work has been performed for the defendant, though under a special agreement not under seal, this count is sufficient, Fitzg. 302. 1 Wils. 117. but if not performed in consequence of the defendant's breach of contract, the declaration should be special, 2 East, 145. if done

at the request of the defendant for a third person, omit the statement of the business, &c. being "of the defendant," and if the defendant's liability be merely collateral, on a written contract, declare specially, 1 Saund. 211. b.

III. Respecting personal services.

* 32

by him the said *A B* before that time done, performed and bestowed, in and about the business of the said *C D*, and for the said *C D*, and at his special, &c. And also for divers materials and other necessary things by *the said *A B* before that time found and provided and used and applied in and about that work and labour for the said *C D*, and at his like special, &c. And being so indebted," &c. (Conclusion as *ante*, 5.) *The quantum meruit thereon is as ante*, 6. *inserting as follows*: "had before that time done, performed and bestowed, other his work and labour, care and diligence, in and about other the business of and for the said *C D*, and had also at the like, &c. before that time found and provided divers other materials and necessary things, and used and applied the same in and about the said last-mentioned work and labour, he the said *C D* undertook," &c. (Conclusion as *ante*, 6.) [Add two counts for goods sold—money paid—and the account stated—and breach. *If the demand be for work only, omit those parts which relate to the materials.*]

55. For work by plaintiff and his servants, with horses and carriages, or with lighters, &c.

The indebitatus count is as ante, 5. *inserting these words*: "for the work and labour, care and diligence of the said *A B*, before that time done, performed and bestowed, by him the said *A B* and his servants, and with his horses, carts and carriages; [or, "with his lighters and other vessels,"] in and about the business of the said *C D*, and for the said *C D*, and at his special," &c. (Conclusion as *ante*, 5.)

N. B. If it be for the carriage of goods, instead of the words between the brackets, say, "in and about the carrying and conveying of divers goods and chattels, wares and merchandise, and delivering the same for the said *C D*, and at his special," &c. [or the count may be as in the next *indebitatus* count.] *The quantum meruit thereon is as ante*, 6. *inserting as follows*: "had before that time done, performed and bestowed other his work and labour, care and diligence, by himself and his servants, and with his horses, carts, and carriages; [or, "with his lighters and other vessels,"] in and about the business of the said *C D*, and for the said *C D*, he the said *C D* undertook," &c. (Conclusion as *ante*, 6.) Add one *indebitatus assumpsit* *count for work and labour generally—and the account stated—and breach.

* 33

The indebitatus count is as ante, 5. inserting these words : *III. Respecting personal services.*
 "for the carriage and conveyance of divers goods, wares, and merchandise, by the said *A B* before that time carried and conveyed in certain carts and other carriages for the said *C D* and at his special, &c. and being so indebted," &c. (a) (Conclusion as ante, 5.) *The quantum meruit is as ante, 6. inserting as follows :* "had before that time carried and conveyed divers other goods, &c. in certain other carts and carriages, for the said *C D*, he the said *C D* undertook," &c. (Conclusion as ante, 6.)

The indebitatus count is as ante, 5. inserting these words : *57. For work, journeies and attendance.*
 "for the work and labour, care and diligence of the said *A B*, by him the said *A B* done, performed and bestowed, in and about the business of the said *C D*, and for the said *C D*, and at his special, &c. and for divers journeies and attendances by the said *A B*, before that time made, performed and given, in and about the said work and labour for the said *C D*, and at his like special, &c. and being so indebted," &c. (Conclusion as ante, 5.) *The quantum meruit thereon is as ante, 6. inserting as follows :* "had before that time done, performed and bestowed, other his work and labour, care and diligence in and about other the business of the said *C D*, and for the said *C D*, and had also at the like, &c. before that time made, performed and given, divers other journeies and attendances in and about the said last mentioned work and labour for the said *C D*, he the said *C D* undertook," &c. (Conclusion as ante, 6.) [Add count for money paid—account stated—and breach.]

* *The indebitatus count is as ante, 5. inserting these words :* ** 34*
 "for the work and labour, care, diligence and attendance, of the said *A B*, by him the said *A B* before that time done, performed and bestowed, as the agent of and for the said *C D*, and on his retainer, and for certain commission and reward due and of right payable from the said *C D* to the said *A B* in respect thereof, and being so indebted," &c. (Conclusion as ante, 5.) *The quantum meruit thereon is as ante, 6. inserting as follows :* "had before that time done, performed and bestowed, other his work and

(a) See the observation on the last rally—and the account stated—and *indebitatus* count: add one *indebitatus* count for work and labour generally—breach.
 (b) See 1 Wentw. 195.

III. Respecting personal services.

labour, care, diligence and attendance as the agent of and for the said *C D*, he the said *C D* undertook," &c. (Conclusion as *ante*, 6.) [Add one count for work and labour generally—account stated—and breach.]

59. For work as a factor or agent in selling goods.

The indebitatus count is as ante, 6. inserting these words: "for the work and labour, care and diligence of the said *A B*, by him the said *A B* before that time done, performed and bestowed, as the factor and agent of the said *C D*, in and about the selling and disposing of divers goods, wares and merchandise of the said *C D*, and in and about other the business of the said *C D*, and for the said *C D*, and at his special, &c. And being so indebted," &c. (Conclusion as *ante*, 6.) *The quantum meruit thereon is as ante, 6. inserting these words:* "had before that time done, performed and bestowed, other his work and labour, care and diligence as the factor and agent of the said *C D*, in and about the selling and disposing of divers other goods, wares and merchandise, and in and about other the business of the said *C D*, and for the said *C D*, he the said *C D* undertook," &c. (Conclusion as *ante*, 6.) [Add one count for work and labour generally—the account stated—and breach.]

* 35

60. As an insurance broker. (c)

The indebitatus count is as ante, 5. inserting these words: "for the work and labour, care and diligence of the said *A B*, by him before that time done, performed and bestowed, in and about the writing, drawing, and making out of divers policies of insurance, of divers ships and vessels, goods, wares and merchandise before that time written, drawn and made out by the said *A B*, as an insurance-broker, and in and about the causing and procuring divers persons to insure divers sums of money upon the said ships and vessels, goods, wares and merchandise, at the special, &c. and for divers sums of money before that time advanced and paid by the said *A B* for the said *C D*, at his like, &c. to divers persons as and for certain premiums and rewards, for the underwriting and subscribing the said policies of insurance, before that time underwritten and subscribed for the insurance of the said ships and vessels, goods, wares and merchandise during certain voyages undertaken by

the said ships and vessels and for the trouble, care, and diligence of the said *A B* in that behalf, at the like special, &c. And being so indebted," &c. (Conclusion as *ante*, 5.) *The quantum meruit thereon is as ante*, 6. inserting as follows: "in consideration that the said *A B*, as such insurance-broker as aforesaid, at the like, &c. had before that time done, performed and bestowed, other his work and labour, care and diligence, in and about the writing, drawing and making out of divers other policies of insurance of divers other ships and vessels, goods, wares and merchandise, of and for the said *C D*, and also in and about the causing and procuring divers other persons to insure divers other sums of money upon the said ships and vessels, goods, wares and merchandise, and had also at the like, &c. advanced and paid other divers sums of money for the said *C D*, to divers other persons as and for certain premiums and rewards for their underwriting and subscribing of the said last-mentioned policies of insurance, before that time underwritten, and subscribed by them for the insurance of divers other sums of money *upon the said last-mentioned ships and vessels, goods, wares and merchandise, during certain voyages undertaken by the said last-mentioned ships and vessels, and had also at the like, &c. bestowed other his trouble, and used other his care and diligence. He the said *C D* undertook," &c. (Conclusion as *ante*, 6.) [Add one *indebitatus assumpsit* count for work and labour generally—the money counts—and breach.]

III. *Respecting personal service.*

* 36

The indebitatus count is as ante, 5. inserting these words: "for certain premiums of insurance before that time and then due and payable from the said *C D* to the said *A B*, upon, for, and in respect of his the said *A B* having before then, at the special instance and request of the said *C D*, underwritten and subscribed divers policies of insurance for and on the behalf and on the account of the said *C D*, for the insurance of divers large sums of money upon divers ships and vessels, and also divers goods and merchandise by the said *A B*, before that

61. For premiums of insurance. (d)

(d) This count is sufficient, 2 Lev. 153. Park. 26.

III. *Respecting personal services.*

time insured for the said *C D*, and at his special instance and request, and being so indebted," &c. (Conclusion as *ante*, 5.)

The quantum meruit thereon is as ante, 6. *inserting as follows*: "had before that time insured divers other ships, &c. (or "divers other large sums of money upon divers other ships and vessels," &c.) for the said *C D*, he the said *C D* undertook," &c. (Conclusion as *ante*, 6.)

62. As a surveyor in drawing plans, &c. and for journies and attendances.

The indebitatus count is as ante, 5. *inserting these words*:

"for the work and labour, care, diligence and attendance of the said *A B*, by him the said *A B*, before that time done, performed and bestowed, as a surveyor in and about the drawing of divers plans, elevations, and sections of buildings, for the said *C D*, and at his request, and in and about the surveying and superintending the erection thereof, and of divers other works for the said *C D*, and at his special, &c. and in and about the admeasurement and valuation of certain works, and the payment of certain *workmen's bills for the said *C D*, and in and about other the business of the said *C D*, and at his like, &c. and for divers journies and attendances, before then made, performed and given, by the said *A B* in and about the business of the said *C D*, and at his like, &c. and being so indebted," &c. (Conclusion is as *ante*, 5.) *The quantum meruit thereon is as ante*, 6. *inserting as follows*: "had before that time done, performed and bestowed, other his work and labour, care, diligence and attendance, as a surveyor in and about the drawing of divers other plans, elevations, and sections of buildings, for the said *C D*, and in and about the surveying and superintending the erection thereof, and of divers other works, for the said *C D*, and in and about the admeasurement and valuation of certain works, and the payment of certain workmen's bills, for the said *C D*, and in and about other the business of the said *C D*, and for the said *C D* and had also at the like special instance, &c. before then made, performed and given, divers other journies and attendances, in and about other the business of the said *C D*, he the said *C D* undertook," &c. (Conclusion as *ante*, 6.) [Add one *indebitatus assumpsit* count for work and labour generally—the money counts—and breach.]

* 27

The indebitatus count is as ante, 5. inserting these words : *III. Respect-*
 "for the work and labour, care, diligence, and attendance of *ing personal*
 the said *A B*, by him the said *A B* before that time done, *services.*
 performed and bestowed, for the said *C D*, as a schoolmaster, *63. As a*
 in and about the teaching and instructing of a certain infant(e) *schoolmaster,*
 in reading, writing, arithmetic, good manners, and other neces- *and for books,*
 sary and useful accomplishments and qualifications, and at *and entrance-*
 the special, &c.† and for divers books, pens, and other neces- *money.*
 sary things, by the said *A B* before that time found and pro-
 vided, and used and employed in and about that work and
 labour, for the said *C D*, and at his like special, &c. And be-
 ing so indebted," * &c. (Conclusion as ante, 5.) *The quantum*
meruit thereon is as ante, 6. inserting as follows : " had before
 that time done, performed and bestowed, other his work and
 labour, care, diligence and attendance, for the said *C D*, as a
 schoolmaster in and about the teaching and instructing of the
 said infant in reading, writing, arithmetic, good manners and
 other useful and necessary accomplishments and qualifications ;
 and had also at the like special, &c. before that time found and
 provided divers other books, pens, and other necessary things,
 and used and employed the same in and about the said last-
 mentioned work and labour, for the said *C D*, he the said *C D*
 undertook," &c. [Add one *indebitatus assumpsit* count for work
 and labour generally—one for goods sold—money paid—and
 account stated—and breach.

* 38

N. B. If there be a demand for entrance-money, proceed
 as in the above *indebitatus* count, inserting at the obelisk the
 following words, " and for certain entrance-money before
 " that time and then due and payable from the said *C D* to the
 " said *A B*, upon, for, and in respect of the admission of the
 " said infant into the school of the said *A B*, for the purpose
 " of being taught and instructed as aforesaid." If the action
 be for instruction by the plaintiff's wife as a *schoolmistress*, she
 should not join in the action, (unless the demand accrued be-

(e) It is usual here to say " of one this is unnecessary.
 E F, the infant son of C D," but

III. *Respecting personal services.* fore marriage,)(f) and the count should state, "for the work, " &c. of *E F*, the wife of the said *A B*," &c.

64. As a surgeon and apothecary, and for medicines.
(g)

* 39

The indebitatus count is as ante, 5. inserting these words :

"for the work and labour, care, diligence and attendance of the said *A B*, by him the said *A B* before that time *done, performed and bestowed, as a surgeon and apothecary for the said *C D*, and at his special instance, &c. in and about the healing and curing of the said *C D*, and divers other persons of divers diseases, disorders and maladies, under which they had before then respectively laboured and languished, and in and about the endeavouring to heal and cure the said *C D*, and divers other persons of divers other diseases, disorders, and maladies, under which they had before then also respectively laboured and languished, and for divers medicines and other necessary things before that time, found and provided, administered, delivered and applied by the said *A B* on those occasions, for the said *C D*, and at his like special instance and request, and being so indebted," &c. (Conclusion as *ante*, 5.)

The quantum meruit thereon is as ante, 6. inserting as follows :

"had before that time, done, performed and bestowed other his work and labour, care, diligence and attendance, as a surgeon and apothecary, in and about the healing and curing of the said *C D*, and divers other persons of divers other diseases, disorders, and maladies, under which they had before then respectively laboured and languished, and also in and about the endeavouring, &c. and had also at the like, &c. before that time found and provided, administered, delivered and applied, divers other medicines and necessary things on those last-mentioned occasions for the said *C D*, he the said *C D* undertook," &c. (Conclusion as *ante*, 6.) [Add counts for work and labour, and journies—for goods sold—money paid—and the account stated.]

(f) 1 Salk. 114.

(g) If also for the inoculation of a child, say, "and in and about the inoculating of a certain child of the said *C D*, and in and about divers other surgical operations for the said *C D*, and at his special," &c. the

declaration must not state for curing the plaintiff of the venereal disease, 2 Wils. 20. A physician cannot maintain an action for his fees, they being considered as honorary. 4 T. R. 317.

The indebitatus count is as ante, 5. inserting these words: III. Respect-
 "for the work and labour, care, diligence and attendance of *ing personal*
 the said *A B*, by him the said *A B* before that time done, *services.*
 performed and bestowed, as a surgeon, apothecary and man-
 midwife, at the special, &c. in and about the visiting and attend-
 ing upon *E F*, the wife of the said *C D*, then pregnant and
 labouring with child, and languishing under divers sicknesses
 and maladies, and in and about *the delivering of the said *E F*,
 of the child with which she was then pregnant, and in and
 about the healing and curing of the said *E F*, the wife of the
 said *C D*, of divers disorders, sicknesses and maladies, with
 which she was during the time aforesaid and afterwards afflict-
 ed, and for divers medicines and other necessary things be-
 fore that time found and provided, and used, and applied by
 the said *A B*, in and about the healing and curing the said *E F*,
 the wife of the said *C D*, of the said sicknesses, disorders
 and maladies, at the like special instance, &c. and being so in-
 debted," &c. (Conclusion is as ante, 5.) *The quantum meruit*
thereon is as ante, 6. inserting as follows: "had before that
 time done, performed and bestowed, other his work and la-
 bour, care and diligence as a surgeon, apothecary, and man-
 midwife, in and about the visiting and attending upon the said
E F, the wife of the said *C D*, then pregnant and labouring
 with child, and languishing under divers sicknesses and mala-
 dies, and in and about the delivering of the said *E F*, of the
 child with which she was then pregnant, and in and about the
 healing and curing of the said *E F*, the wife of the said *C D*,
 of divers other disorders, sicknesses, and maladies, with which
 she was, during the time last aforesaid, and afterwards afflict-
 ed, and had also at the like special instance, &c. before that
 time found and provided, and used, and applied divers other
 medicines and necessary things in and about the healing and
 curing of the said *E F*, the wife of the said *C D*, of the said
 last-mentioned sicknesses, disorders and maladies, he the said
C D undertook," &c. [Add one *indebitatus* count for work
 generally—one ditto for goods sold—money paid—account
 stated—and breach.]

65. As a sur-
 geon, apothecary, and man
 midwife.

* 40

III. Respect-
ing personal
services.

66. As a
nurse.

* 41

The indebitatus count is as ante, 5. inserting these words :
“ for the work and labour, care and diligence of the said *A B*,
by her the said *A B* before that time done, performed and be-
stowed, as a nurse for the said *C D*, and at his special, &c. in
and about the nursing, attending, and taking *care of the said
C D, (or “ of divers persons.”) whilst he was sick and labour-
ing under divers diseases, disorders and maladies, and being
so indebted,” &c. (Conclusion as ante 5.) *The quantum me-
ruit thereon is as ante, 6. inserting as follows :* “ had before that
time done, performed and bestowed, other her work and labour,
care and diligence as a nurse, in and about the nursing, at-
tending and taking care of the said *C D*, whilst he was sick
and labouring under divers other diseases, disorders, and mala-
dies, he the said *C D* undertook,” &c. (Conclusion as ante, 6.)

67. As an un-
dertaker of
funerals.

The indebitatus count is as ante, 5. inserting these words :
“ for the work and labour, care, diligence and attendance of the
said *A B* as an undertaker of funerals, before that time done,
performed and bestowed by the said *A B* and his servants,
in and about the funeral of one *E F*, on the retainer, and at
the special instance, &c. and for divers materials and other ne-
cessary things used and applied in and about the furnishing
and conducting the said funeral, by the said *A B*, before that
time found and provided for the said *C D*, and at his like spe-
cial, &c. and being so indebted,” &c. (Conclusion as ante, 5.)
The quantum meruit thereon is as ante, 6. inserting as follows :
“ had before that time done, performed and bestowed other
his work, &c. as an undertaker of funerals, by himself and his
servants, in and about the funeral of the said *E F*, and had also
at the like special, &c. before that time found and provided
divers other materials and necessary things, for the said *C D*,
and used and applied the same in and about the furnishing and
conducting of the said last-mentioned funeral, he the said *C D*
undertook,” &c. (Conclusion as ante, 6.) [Add one *indebita-
tus*, for work and labour generally—one ditto for goods sold—
money paid—account stated, and breach.]

The indebitatus count is as ante, 5. inserting these words: *III. Respecting personal services.*
 "for the work and labour, care, diligence and attendance *of the said *A B*, by him the said *A B* before that time done and performed, &c. in preaching and celebrating divine service in the parochial church of —, for the said *C D*, and at his special instance, &c. and being so indebted," &c. (Conclusion as ante, 5.) *The quantum meruit thereon is as ante, 6. inserting as follows:* "had before that time done and performed, &c. other his work and labour, care, diligence and attendance, in preaching and celebrating divine service in the parochial church of —, &c. aforesaid, for the said *C D*, he the said *C D* undertook," &c. (Conclusion as ante, 6.)

68. As a; curate. (i)
 * 42

FOURTHLY—RESPECTING MONIES.

The indebitatus count is as ante, 5. inserting these words: *69. For money lent.*
 "for so much money, by the said *A B* before that time lent and advanced to the said *C D*, at his special instance and request. And being so indebted, &c. (Conclusion, as ante, 5.)

The indebitatus count is as ante, 5. inserting these words: *70. Money paid.*
 "for so much money by the said *A B* before that time paid, laid out and expended, to and for the use of the said *C D*, at his like special instance and request. And being so indebted," &c. (Conclusion as ante, 5.)

The indebitatus count is as ante, 5. inserting these words: *71. Money had and received.*
 "for so much money by the said *C D* before that time had and received to and for the use of the said *A B*, and being so indebted," &c. (Conclusion as ante, 5.)

The indebitatus count is as ante, 5. inserting these words: *72. For interest.*
 "for so much money before that time, and then due and payable from the said *C D* to the said *A B*, for interest upon and for the forbearance of divers large sums of money before then

III. *Respecting personal services.*

lent and advanced by the said *A B* to the said **C D*, at his special instance and request, and by him the said *A B* forbore to the said *C D* for divers long spaces of time, before then elapsed, at the like special instance and request of the said *C D*, and also for other money before that time and then due and payable from the said *C D* to the said *A B*, for interest upon and for the forbearance of divers other large sums of money before then due and owing from the said *C D* to the said *A B*, and by him the said *A B* forbore to the said *C D* for divers long spaces of time before then elapsed, at the like special instance and request of the said *C D*. And being so indebted, he the said *C D*," &c. (Conclusion as *ante*, 5.)

73. For work, goods sold, and on the money counts in one count.
(j)

The indebitatus count is as ante, 5. inserting these words: "for the work and labour, care and diligence of the said *A B*, by him the said *A B* before that time done, performed and bestowed, in and about the business of the said *C D*, and for the said *C D*, and at his special instance and request, and also in the further sum of —*l.* of like lawful money, for divers goods, wares and merchandise, by the said *A B* before that time sold and delivered to the said *C D*, and at his like special instance and request, and also in the further sum of —*l.* of like lawful money, for money by the said *A B*, before that time lent and advanced to, and paid, laid out and expended for the said *C D*, and at his like special instance and request, and also in the further sum of —*l.* of like lawful money, for other money by the said *C D* before that time had and received to and for the use of the said *A B*, and being so indebted, he the said *C D*, in consideration thereof afterwards, to wit, on, &c. **aforesaid*, at, &c. *aforesaid*, undertook, and then and there faithfully promised the said *A B* to pay him the said several sums of money in this count mentioned, when he the said *C D* should be thereunto afterwards requested."

* 44

(j) This count is to precede the account stated and breach. In order to avoid expense it may frequently be advisable, especially against a prisoner, to adopt this count, which is recommended in 2 Saund. 122. a. n. 2. and is clearly sustainable, see Cro.

Jas. 245. Yelv. 175. 1 Brownl. Ent. 71. 2 Bl. Rep. 910. See vol. 1. tit. Declarations; any number of causes of actions, to which the *indebitatus* count is applicable, may be included in one count.

And whereas also the said *C D* afterwards, to wit, on, &c. *IV. Respecting Money.*
 last aforesaid, at, &c. aforesaid, accounted with the said *A B*, of *74. On an account stated.*
 and concerning divers other sums of money from the said *C D*
 to the said *A B* before that time due and owing, and then in
 arrear and unpaid, and upon such accounting the said *C D* was
 then and there found to be in arrear and indebted to the said *A B*
 in the further sum of —*l.* of like lawful money, and being so
 found in arrear and indebted, &c. (Conclusion as *ante*, 5.)

Nevertheless the said *C D*, not regarding his said several *75. Common breach.(k)*
 promises and undertakings, but contriving and fraudulently intending,
 craftily and subtly to deceive and defraud the said *A B*, in this behalf,
 hath not as yet paid the said several sums of money, or any, or either
 of them, or any part thereof, to the said *A B*, (although often requested
 so to do,)(*l*) or “ although he the said *C D* afterwards, to wit, on, &c.
 aforesaid, was requested by the said *A B* so to do.”)(*m*) But the said *C D*
 to pay him the same hath hitherto wholly neglected and refused,
 and still doth neglect and refuse. To the damage of the said *A B*,
 of —*l.* and therefore he brings his suit, &c.

Pledges to prosecute, { John Doe,
 and
 Richard Roe.

***V. RELATING TO THE CHARACTER IN WHICH THE PLAINTIFF SUES OR THE DEFENDANT IS SUED.**

* 45

FIRST—PARTNERS.

Markham and Le Blanc.

Hilary Term, 47 Geo. III.(n)

Middlesex, (to wit.) *A B* complains of *C D*, being, &c. *76. By a surviving partner, on promises to both partners.(o)*
 For that whereas the said *C D* in the life-time of one *E F*, since

(*k*) This breach, from the language of it, is obviously only applicable to counts on promises to pay money. *requisitus*, Com. Dig. tit. Pleader, C. 70.

Therefore special counts not being confined to money demands in general, respectively contain a separate breach. (*m*) Sometimes this special request is necessary, see Com. Dig. tit. Pleader, C. 69, 70. 1 Saund. 33. n. 2.

(*l*) This is termed the *Hret sepius* (*n*) *Ante*, 1. n. (*a*). (*o*) As to this count, see 2 Saund. 121, 122. 5 Esp. Rep. 32. Vin. Abr. tit. Partners, D.

DECLARATIONS IN ASSUMPSIT.

*V. Relating
to the character,
&c.*

deceased, to wit, on, &c. at, &c. was indebted to the said *A B* and the said *E F*, in the sum of —*l.* of lawful, &c. for the work and labour, &c. of the said *A B* and *E F*, by the said *A B* and *E F* before that time done, performed and bestowed, for the said *C D*, and at his special instance, &c. (*Any other debt, "as for goods sold," &c. is to be described in the same manner.*) And being so indebted, he the said *C D*, in consideration thereof, afterwards, and in the life-time of the said *E F*, to wit, on, &c. aforesaid, at, &c. aforesaid, undertook, &c. (laying the promises to both the partners as *ante*, 5.) *The quantum meruit is as follows:* "And whereas also afterwards, and in the life-time of the said *E F*, since deceased, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said *A B* and *E F*, at the like special instance, &c. had before that time done; &c. [*Here state the subject matter of the debt, and the promise to have been made to both the partners.*] And the said *A B* avers, that he and the said *E F* in his life-time, therefore reasonably deserved to have, &c. (as *ante*, 6.) whereof the said *C D* afterwards, and in the life-time of the said *E F*, to wit, on, &c. aforesaid, there had notice.— [*Here insert the account stated, with both the partners, and the promise to them; and if the transaction be for goods sold, &c. or on the money counts, such counts are to be framed as above.*]

* 46

77. Breach.

Nevertheless the said *C D* not regarding, &c. (*ut ante*, breach p. 44.) but contriving, &c. to deceive and defraud the said *A B* and *E F*, in the life-time of the said *E F*, and the said *A B* since the death of the said *E F* in this behalf, hath not as yet paid the said several sums of money, or any, or either of them, or any part thereof, to the said *A B* and *E F*, or either of them, in the life-time of the said *E F*, or to the said *A B* since the death of the said *E F*; (although often requested so to do;) but he to do this hath hitherto wholly refused, and still doth refuse.† To the damage of the said *A B* of —*l.* and therefore he brings his suit, &c. Pledges, &c.

N. B. If the debt be considerable, or the deceased partner has been dead six years; or it may on any other account be advisable for the plaintiff to avail himself of a promise or acknowledgment to him since the death of his partner, insert at the above obelisk, before the conclusion, the following counts. See 3 *East*, 409.

And whereas also the said *C D* afterwards, and in the lifetime of the said *E F* deceased, to wit, on, &c. aforesaid, at, &c. aforesaid, was indebted to the said *A B* and to the said *E F*, in the further sum of —*l.* of like lawful money, for the work and labour, care and diligence, of the said *A B* and the said *E F*, by them before that time done, performed and bestowed, for the said *C D*, and at his special, &c. and also in the further sum of —*l.* of like lawful money, for divers goods, wares and merchandise, by the said *A B* and the said *E F*, now deceased, before that time sold and delivered to the said *C D*, and at his like special, &c. and also in the further sum of —*l.* of like lawful money, for money by the said *A B* and the said *E F*, before that time lent and advanced to, and paid, laid out, and expended, for the said *C D*, and at his like special instance and request, and also in the further sum of —*l.* of like lawful money, for other money by the said *C D*, before that time had and received, to and for the use of the said *A B* and the said *E F*. And the said *C D* being so indebted, and the said several sums of money in this count mentioned, being and remaining wholly due, *unpaid, and unsatisfied, he the said *C D* in consideration thereof afterwards, and after the death of the said *E F*, to wit, on, &c. at, &c. aforesaid, undertook, and then and there faithfully promised the said *A B* to pay him the said several sums of money in this count mentioned, when he the said *C D* should be thereunto afterwards requested. [*Add the account stated with the plaintiff of monies due to him only, and in the breach refer only to the counts in which the promises are stated to have been made to the plaintiff alone, and conclude as usual,*] to the damage of *A B* only.

N. B. If the plaintiff declare in other counts, as he may, (3 *T. R.* 493. 1 *Esp. Rep.* 47. 2 *T. R.* 476. 6 *T. R.* 582.) for money due to him after the death of his partner, and on a contract merely with himself, insert those counts after the conclusion to the others, at the obelisk, or if the last set of counts be also inserted, introduce the following counts immediately before the last account stated.

And whereas also the said *C D*, after the death of the said *E F*, to wit, on, &c. at, &c. was indebted to the said *A B*,

V. Relating to the character, &c.

78. Counts on promises to the surviving partner to pay debts due before the death.

* 47

79. Counts on promises for work, &c. by the plaintiff only.

*V. Relating
to the character,
&c.*

&c. [Proceed in the usual form at the suit of one plaintiff only, making the conclusion to these counts only, and not noticing *E F*.]

80. *Against
a surviving
partner for
goods sold,
&c. (p)*

Middlesex, (to wit.) *A B* complains of *C D*, being, &c. For that whereas the said *C D* and one *E F*, in his life-time, now deceased, and whom the said *C D* hath survived, on, &c. at, &c. were indebted to the said *A B*, &c. for the work and labour, &c. of the said *A B*, by the said *A B* before that time done, &c. for the said *C D* and *E F*. at their special instance, &c. and being so indebted, they the said *C D* and *E F*, in consideration thereof, afterwards, and in the life-time of the said *E F*, to wit, on, &c. aforesaid, at, &c. aforesaid, undertook, &c. (*Quantum meruit as follows* :) And whereas also afterwards, and in the life-time of the said *E F*, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said *A B*, at the like special instance and request of the said *C D* and *E F*, had before that time done, &c. for the said *C D* and *E F*, they the said *C D* and *E F* undertook, &c. and the said *A B* avers, that he therefore reasonably deserved to have of the said *C D* and *E F*, the further sum, &c. whereof the said *C D* and *E F*, afterwards, and in the life-time of the said *E F*, on, &c. aforesaid, there had notice. Nevertheless the said *C D* and *E F*, in the life-time of the said *E F* and the said *C D*, since the death of the said *E F*, not regarding their said several promises, &c. but contriving, &c. have not, nor hath either of them as yet paid, &c. (although often requested so to do. But to pay the same or any part thereof, to the said *A B*, the said *C D* and *E F* in the life-time of the said *E F*, wholly refused, and the said *C D* hath ever since the death of the said *E F*, hitherto wholly refused and still refuses so to do. [See

* 48

81. *Breach.* on, &c. aforesaid, there had notice. Nevertheless the said *C D* and *E F*, in the life-time of the said *E F* and the said *C D*, since the death of the said *E F*, not regarding their said several promises, &c. but contriving, &c. have not, nor hath either of them as yet paid, &c. (although often requested so to do. But to pay the same or any part thereof, to the said *A B*, the said *C D* and *E F* in the life-time of the said *E F*, wholly refused, and the said *C D* hath ever since the death of the said *E F*, hitherto wholly refused and still refuses so to do. [See the *N. B.* at the obelisk, ante, page 46. It may be advisable here to insert the following counts on promises by the surviving partner, which may be joined ;(q)] to the damage, &c.

(p) As to these counts, Comb. (q) 5 T. R. 493. 1 Esp. Rep. 47. 363. Vin. Abr. tit. Partners, D. 2 2 T. R. 476. 6 T. R. 582. T. R. 478. 6 T. R. 363.

And whereas, also, the said *C D* and *E F* afterwards, and in the life-time of the said *E F*, now deceased, to wit. on. &c. aforesaid, at. &c. aforesaid, were indebted to the said *A B* in the further sum of —*l.* of like lawful money, for the work and labour, care and diligence of the said *A B* by him the said *A B* before that time done, performed and bestowed, in and about the business of the said *C D* and *E F*, and for the said *C D* and *E F*, and at their special instance and request, also in the further sum of —*l.* of like lawful money, for divers goods, wares *and merchandise by the said *A B* before that time sold and delivered to the said *C D* and *E F*, at their like special instance and request; and also in the further sum of —*l.* of like lawful money, for money by the said *A B* before that time lent and advanced to, and paid, laid out and expended, for the said *C D* and *E F*, and at their like special instance and request; and also in the further sum of —*l.* of like lawful money, for other money by the said *C D* and *E F*, before that time had and received to and for the use of the said *A B*, and being so indebted, and the said several sums of money in this count mentioned, being and remaining wholly due and owing, unpaid and unsatisfied, he the said *C D*, in consideration thereof afterwards. and after the death of the said *E F*, to wit, on, &c. at, &c. aforesaid, undertook, and then and there faithfully promised the said *A B* to pay him the said sum of money in this count mentioned when he the said *C D* should be thereunto afterwards requested.(*r*)

V. Relating to the character, &c.

82. Counts on promises by defendant after the death of his partner.

* 49

SECONDLY—HUSBAND AND WIFE.

—, (to wit.) *A B*, and *C* his wife, complain of *D E*, being, &c. For that whereas the said *D E*, whilst the said *C* was sole and unmarried, to wit, on, &c. at, &c. was indebted to the said *C* in the sum of —*l.* of lawful, &c. for the work and labour of the said *C*, by her the said *C* before that time done, &c. for

83. By baron and feme for work, &c. or goods sold by the feme before marriage.
(*s*)

(*r*) If there be any demand for goods, &c. sold to the defendant since the death of his partner, here insert counts accordingly, not noticing the deceased, and conclude with the account stated and breach applicable only to the counts founded on the defendant's promise alone.

(*s*) Whenever the wife joins, her interest must appear, 2 Bl. Rep. 1236.

V. Relating to the character, &c.

* 50

Breach.

the said *D E*, and at his special instance, &c. (or "for divers goods, wares and merchandise, by the said *C* before that time sold and delivered to the said *D E*," &c.) and being so indebted, he the said *D E*, in consideration thereof afterwards, and whilst the said *C* was *sole* and unmarried, to wit, on, &c. aforesaid, "at, &c. aforesaid, undertook, &c. the said *C* to pay her the said sum of money, when he the said *D E* should be thereunto afterwards requested. *The quantum meruit thereon is as follows:* And whereas also afterwards, and whilst the said *C* was *sole* and unmarried, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said *C*, at the like special instance, &c. had before that time done, &c. he the said *D E* undertook, &c. the said *C* to pay her so much money as she, &c. And the said *A B*, and *C* his wife, avers that the said *C*, whilst she was *sole* and unmarried, therefore reasonably deserved to have, &c. whereof, &c. [*Add the money counts—and the account stated—with the feme before marriage.*] Yet the said *D E* not regarding, &c. but contriving, &c. to deceive and defraud the said *C* whilst she was *sole* and unmarried, and the said *A B*, and *C* his wife, since their intermarriage, in this behalf, hath not as yet paid the said sums of money, or any part thereof, to the said *C*, whilst she was *sole* and unmarried, or to the said *A B*, and *C* his wife, (†) or either of them, since their intermarriage, (although often requested so to do.) But he to do this hath hitherto wholly refused and still doth refuse to pay the same, or any part thereof to the said *A B*, and *C* his wife. [*It may be advisable in some cases here to add counts on promises since the marriage.*] To the damage of the said *A B*, and *C* his wife, of —l. and therefore they bring their suit, &c.

Pledges, &c.

¶. Against baron and feme for work done for feme before marriage.

———, (to wit.) *A B* complains of *C D*, and *E* his wife, being, &c. For that whereas the said *E*, whilst she was *sole* and unmarried, to wit, on, &c. at, &c. was indebted, &c. for the work

(†) As to the language of the breach, Vent. 119. 2 Rich. C. P. 293. 3. Wils. 208. 1 Ld. Raym. 284. †

and labour, &c. before that time done, &c. for the said *E*, and at her special instance, &c. and being so indebted, she the said *E*, in consideration thereof afterwards, and whilst she the said *E* was sole and unmarried, to wit, on, &c. aforesaid, at, &c. aforesaid, undertook, &c. *The quantum meruit thereon is as follows:* And whereas also afterwards, and whilst the said *E* was sole and unmarried, to wit, &c. aforesaid, at, &c. aforesaid, in consideration that the said *A B*, at the like special instance, &c. had before that time done, &c. for the said *E*, she the said *E* undertook, &c. and the said *A B* avers, that he therefore reasonably deserved to have of the said *E* whilst she was sole and unmarried, the further sum, &c. whereof the said *E* afterwards, and whilst she was sole and unmarried, to wit, on, &c. there had notice: [*add the monies and account stated by the feme before marriage:*] Yet the said *E*, whilst she was sole and unmarried, and the said *C D* and *E*, since their intermarriage, not regarding the said several promises and undertakings of the said *E*, but contriving, &c. have not nor hath either of them as yet paid, &c. (although often requested so to do) but to pay the same or any part thereof to the said *A B*, the said *E*, whilst she was sole and unmarried, wholly refused, and the said *C D*, and *E* his wife, have ever since their intermarriage, hitherto wholly refused, and still refuse so to do. [*It may be advisable in some cases here to add counts on promises since the marriage.*] To the damage of the said *A B*, &c.

V. Relating to the character, &c.

* 51

Breach.

THIRDLY—ASSIGNEES.

—, (to wit.) *A* and *B*, assignees of the estate and effects of *C D*, a bankrupt, according to the force, form and effect of the several statutes concerning bankrupts, complain of

85. By the assignees of a bankrupt, for work before the bankruptcy.^(u)

(u) This form of declaring without setting out the petitioning creditor's debt, commission, &c. is settled to be good, Lutw. 274. 277. and 1 B. & P. 448. 2 Lord Raym. 1548. Carth. 29. When an assignee has been re-

moved, the last assignee may sue as assignee generally, without naming the former assignee, 5 Geo. II. c. 30. s. 31. When assignees should declare without naming themselves assignees, see Cowp. 569.

*V. Relating
to the charac-
ter, &c.*

* 52

E F being, &c. For that whereas the said *E F*, on, &c. at, &c. was indebted to the said *C D*, before *he became bankrupt, in the sum of —*l.* of lawful, &c. for the work and labour, &c. of the said *C D*, by the said *C D* before that time done, &c. for the said *E F*, and at his special instance, &c. and being so indebted, he the said *E F*, in consideration thereof, afterwards, and before the said *C D* became bankrupt, to wit, on, &c. aforesaid, at, &c. aforesaid, undertook, &c. *The quantum meruit is as follows:* And whereas also, afterwards, and before the said *C D* became bankrupt, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said *C D*, at the like special instance, &c. had before that time done, &c. and the said *A* and *B*, assignees as aforesaid aver, that the said *C D*, before he became bankrupt, therefore reasonably deserved to have, &c. whereof, &c. Yet the said *E F*, not regarding, &c. but contriving, &c. to deceive and defraud the said *C D*, before he became bankrupt, and the said *A* and *B*, as assignees as aforesaid, since the said *C D* became bankrupt, in this behalf, hath not as yet paid the said several sums of money, or any, or either of them, or any part thereof, to the said *C D*, before he became bankrupt, or to the said *A* and *B*, assignees as aforesaid, or either of them, since the said *C D* became bankrupt, (although often requested so to do.) But he to do this hath hitherto wholly refused, and still refuses to pay the same, or any part thereof to the said *A* and *B*, as assignees as aforesaid.† To the damage of the said *A* and *B* as assignees aforesaid, of —*l.* and therefore they bring their suit, &c.

Breach.

Pledges, &c.

As to the joinder of different counts in an action by assignees, see § T. R. 433. 779. When there has been any promise or acknowledgment to the assignees, or cause of action accruing after the act of bankruptcy, it may be expedient at the obelisk to add the following counts:

86. The like on promises to the assignees after the bankruptcy.

* 53

And whereas also, the said *C D* before the said *E F* became bankrupt, to wit, on, &c. at, &c. was indebted to the said *E F* in the further sum of —*l.* of like lawful *money for the work and labour, care and diligence, of the said *E F*, by him the said *E F*, before that time done, performed and bestowed, in and about the business of the said *C D*, and for the said *C D*,

and at his special instance and request, and also in the further sum of —*l.* of like lawful money, for divers goods, wares and merchandise, by the said *E F*, before that time sold and delivered to the said *C D*, and at his like special instance and request, and also in the further sum of —*l.* of like lawful money, for money by the said *E F* before that lent and advanced to, and paid, laid out and expended for the said *C D*, and at his like special instance and request, and also in the further sum of —*l.* of like lawful money, for other money, by the said *C D*, before that time had and received, to and for the use, of the said *E F*, and being so indebted, and the said several sums of money in this count mentioned, being and remaining wholly due and unpaid, he the said *C D*, in consideration thereof afterwards, and after the said *E F* became bankrupt, to wit, on, &c. at, &c. aforesaid, undertook and then and there faithfully promised the said *A* and *B* as assignees as aforesaid, to pay them the said several sums of money in this count mentioned, when he the said *C D* should be thereunto afterwards requested. (w) And whereas also the said *C D*, afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, accounted with the said *A* and *B* as assignees as aforesaid, of and concerning divers other sums of money from the said *C D* to the said *A B* as assignee, as aforesaid, before that time due and owing and then in arrear and unpaid, and upon that accounting the said *C D* was then and there found to be in arrear, and indebted to the said *A* and *B* as assignees as aforesaid, in the further sum of —*l.* of like lawful money, and being so found in arrear and indebted, and the said last-mentioned *sum of money being and remaining wholly unpaid and unsatisfied, he the said *C D*, in consideration thereof afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said *A* and *B* as assignees as aforesaid, to pay them the said sum of money last mentioned, whenever afterwards he the said *C D* should be thereunto requested. Yet the said *C D* not regarding his said several three(x) last-mentioned pro-

V. Relating to the character, &c.

Account stated.

* 54

Breach.

(w) If the assignees have in that character sold goods to the defendant, or he has since the bankruptcy received money for their use, here add counts for goods sold by them as assignees, or for money had and received to their use as assignees, as the propriety of which counts see 2 Show. 250. 6 East, 405.

(x) According to the number of counts in which the promises are laid to the assignees.

V. Relating to the character, &c.

mises and undertakings, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said *A* and *B* as assignees as aforesaid in this respect, hath not yet paid the said several sums of money in the last three counts mentioned, or either of them, or any part thereof to the said *A* and *B*, as assignees as aforesaid (although often requested so to do.) But the said *C D* to pay the same or any part thereof hath hitherto altogether refused and still doth refuse. To the damage of the said *A* and *B* as assignees as aforesaid, of —*l.* and therefore they bring their suit, &c.

Pledges, &c.

87. By a surviving assignee.

If the plaintiff be a *surviving* assignee, call him so throughout, and conclude as follows: " Yet the said *E F* not regarding, &c. but contriving, &c. to deceive and defraud the said *C D* before he became bankrupt, and the said *A* and one *B* in his life-time, now deceased, and whom the said *A* hath survived, (which said *A* and *B* in the life-time of the said *B* were assignees of the estate and effects of the said *C D* according to the force, form and effect of the several statutes concerning bankrupts,) after the said *C D* became bankrupt, and the said *A* as surviving assignee as aforesaid, since the death of the said *B* hath not as yet paid to them, or any or either of them, the said several sums of money, &c. (as in the precedent 85. page 52.)

88. By one partner and the assignee of another, being bankrupt, for work and labour before the bankruptcy: (v)

* 55

A B and *C D* (which said *C D* is assignee of the estate and effects of *E F*, a bankrupt, according to the force, *form and effect of the several statutes concerning bankrupts) complain of *G H* being, &c. For that whereas the said *G H* on, &c. at, &c. was indebted to the said *A B* and *E F*, before the said *E F* became bankrupt, in the sum of —*l.* of lawful, &c. for the work and labour, &c. by the said *A B* and *E F*, before that time done, &c. and being so indebted, he the said *G H*, in consideration thereof afterwards, and before the said *E F* became bankrupt, to wit, on, &c. aforesaid, at, &c. undertook, &c. [laying the promises to both the partners.] Yet the said *G H*

Breach.

not regarding, &c. but contriving, &c. to deceive and defraud the said *A B* and *E F*, before the said *E F* became bankrupt, and the said *A B* and *C D* (which said *C D* is assignee as aforesaid) after the said *E F* became a bankrupt in this behalf, hath not as yet paid to them, or any, or either of them, the said several sums of money, or any, or either of them, or any part thereof (although often requested so to do.) But he to do this hath hitherto wholly refused and still refuses to pay the same or any part thereof to the said *A B* and *C D*, (which said *C D* is assignee as aforesaid.) To the damage of the said *A B* and to the said *C D* as assignee as aforesaid of —*l.* and therefore they bring their suit, &c.

V. Relating to the character, &c.

FOURTHLY—EXECUTORS.

—, (to wit.) *A B*, executor of the last will and testament of *E F* deceased, complains of *C D* being, &c. For that whereas the said *C D* on, &c. at, &c. was indebted to the said *E F* in his life-time, in the sum of —*l.* of lawful, &c. for the work and labour of the said *E F*, by the said *E F* before that time done, &c. and being so indebted, &c. (*laying the promise to the said E F in his life-time.*) *The quantum meruit is as follows:* “ and whereas also afterwards, and in the life-time of the said *E F*, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said *E F* had before that time done, &c. And the said *A B*, executor as aforesaid, avers, that the said *E F* in his life-time, therefore reasonably deserved to have, &c. whereof, &c. Yet the said *C D* not regarding, &c. but contriving, &c. to deceive and defraud the said *E F* in his life-time; and the said *A B* as executor as aforesaid, since the death of the said *E F* in this behalf, hath not as yet paid the said several sums of money, or any, or either of them, or any part thereof, to the said *E F* in his life-time, or to the said *A B*, executor as aforesaid, since the death of the said *E F*; (although often requested so to do;) but he to do this hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said *A B*, executor as aforesaid.† To the damage of the said *A B*, as executor as aforesaid, of —*l.* and there-

89. By an executor for work or goods sold, &c. on promises to the testator.

* 56

Breach

*V. Relating
to the character,
&c.
Profert.(z)*

fore he brings his suit, &c. And the said *A B* brings into court here, the letters testamentary of the said *E F* deceased, whereby it fully appears to the said court here, that the said *A B* is executor of the last will and testament of the said *E F* deceased, and hath the execution thereof, &c.

Pledges, &c.

*90. Counts
on promises
to the plain-
tiff as execu-
tor.(a)*

And whereas also, the said *C D* afterwards, and in the life-time of the said *E F* deceased, to wit, on, &c. aforesaid, at, &c. aforesaid, was indebted to the said *E F* in the further sum of —*l.* of like lawful money, for the work and labour, care and diligence, of the said *E F*, by him the said *E F* before that time done, performed and bestowed, *in and about the business of the said *C D*; and for the said *C D*, and at his special instance and request, and also in the further sum of —*l.* of like lawful money, for divers goods, wares and merchandise, by the said *E F*, before that time sold and delivered to the said *C D*, and at his like special instance and request; and also in the further sum of —*l.* of like lawful money, for money by the said *E F*, before that time lent and advanced to, and paid, laid out, and expended for the said *C D*, and at his like special instance and request; and also in the further sum of —*l.* of like lawful money, for other money by the said *C D*, before that time had and received, to, and for the use of the said *E F*. And the said *C D* being so indebted, and the said several sums of money being and remaining wholly due and owing, unpaid and unsatisfied, he the said *C D*, in consideration thereof, afterwards, and after the death of the said *E F*, to wit, on, &c. at, &c. aforesaid, undertook, and then and there faithfully promised the said *A B*, as executor as aforesaid, to pay him the said

* 57

(z) If the profert be omitted in a declaration even in *scire facias*, the defendant may demur specially, see 4 and 5 Ann. c. 16. s. 1. 2 Saund. 9. r. 12. Com. Dig. Pleading, O. 3. 17. 2 D. 1. The pledges are added after the profert, and if as sometimes happens in the common pleas, a profert of a deed be stated at the end of a declaration the profert of the letters testamentary follows it.

(a) These counts are to be inserted at the obelisk in the last precedent; they are proper whenever on account of the statute of limitations, &c. it may be expedient to rely on any promise or acknowledgment since the death of the testator. See 2 East, 409. Willes, 29. In support of these counts, the plaintiff should, on the trial, produce the probate. 2 Saund. 47. k.

sum of money in this count mentioned, when he the said *C D* should be thereunto afterwards requested.^(b) And whereas also the said *C D* afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, accounted with the said *A B* as^(c) executor aforesaid, of and concerning divers other sums of money from the said *C D* to the said *A B*, as executor as aforesaid, before that time due and owing, and then in arrear and unpaid.— And upon that accounting the said *C D* was then and there found to be in arrear and indebted to the said *A B* as executor as aforesaid, in the further sum of —*l.* of like lawful money, and being so found in arrear and indebted, he the said *C D* in consideration thereof, afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, undertook, and *then and there faithfully promised the said *A B* as executor as aforesaid, to pay him the said sum of money last-mentioned, whenever afterwards he the said *C D* should be thereunto requested. Yet the said *C D* not regarding his said several three^(d) last-mentioned promises and undertakings so by him in manner and form aforesaid made, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said *A B*, as executor as aforesaid, in this respect hath not yet paid the several sums of money, in the said three last-mentioned counts specified, or any, or either of them, or any part thereof, to the said *A B*, executor as aforesaid, (although often requested so to do.) But the said *C D* to pay the same, or any part thereof, hath hitherto altogether refused, and still doth refuse. To the damage, &c. (as *ante*, page 56. adding profert.)

V. Relating to the character, &c. Account stated.

* 58

Breach.

[In an action at the suit of a surviving executor, describe him accordingly in the beginning and conclude as follows:] Yet the said *C D* not regarding, &c. but contriving, &c. to deceive and defraud the said *E F* in his life-time, and the said

91. By a surviving executor.

(b) If the plaintiff in the character of executor has sold goods to the defendant, or paid money for him, here add counts for goods sold, &c. by the plaintiff as executor. 6 East, 405. 3 East, 104. And if the defendant has received money since the death of testator, add a count for

money had and received, to the plaintiff's use, as executor.

(c) As to this word, see 5 East, 150.

(d) This depends on the number of counts in which the promises are laid to the executor.

*F. Relating
to the character,
&c.*

A B and one *G H* in his life-time, now deceased, and whom the said *A B* hath survived, (which said *A B* and *G H*, in the life-time of the said *G H*, were executors of the last will and testament of the said *E F* deceased,) after the death of the said *E F* and the said *A B*, as surviving executor as aforesaid, since the death of the said *G H*, in this behalf, hath not as yet paid to them, or any, or either of them, the said several sums of money, or any, or either of them, or any part thereof, (although often requested so to do,) but he to do this hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said *A B* as surviving executor as aforesaid.(c) To the damage of the said *A B* as surviving executor as aforesaid, of —*l.* and therefore he brings his suit, &c. *And he brings into court here the letters testamentary of the said *E F* deceased, whereby it fully appears to the said court here, that the said *A B* and *G H*, in the life-time of the said *G H*, were executors of the last will and testament of the said *E F* deceased, with this that the said *A B* will verify that the said *G H* is deceased, and that he the said *A B* hath thereby become, and is the surviving executor of the last will and testament of the said *E F* deceased, and hath the execution thereof, &c.

Pledges, &c.

* 59

Special pro-
fert and veri-
fication.

92. By baron
and feme ex-
ecutrix, be-
fore marriage.

———, (to wit.) *A B* and *C* his wife, (which said *C* is executrix of the last will and testament of *D* deceased,) complain of *E F* being, &c. For that whereas the said *E F*, on, &c. at, &c. was indebted, &c. [as in the common case at the suit of an executor.] Yet the said *E F* not regarding, &c. but contriving, &c. to deceive and defraud the said *D* in his life-time, and the said *C* as executrix as aforesaid, after the death of the said *D*, and whilst she was sole and unmarried, and the said *A B* and *C* his wife, as executrix aforesaid, since their intermarriage, in this behalf, hath not as yet paid to them, or any, or either of them, the said several sums of money, or any part thereof, (although often requested so to do.) But he to do this hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said *A B* and *C* his wife,

(c) It may be advisable to add executor, as in the last precedent counts on promises to the plaintiff as

executrix as aforesaid, or to either of them. To the damage of the said *A B* and *C* his wife, as executrix as aforesaid, of —. and therefore they bring their suit. [*Add profert and pledges.*]

V. Relating to the character, &c.

[As in the last precedent to the conclusion, which is as follows:] Yet the said *E F* not regarding, &c. but contriving, &c. to deceive and defraud the said *D* in his life-time, and the said *A B* and *C* his wife, as executrix as aforesaid, [if there be another executor, say, “and the said *G* and the said *A B* and *C* his wife, as executor and executrix as aforesaid,”] since the death of the said *D* in this behalf, hath not as yet paid to them, or any, or either of them, the said several sums of money, or any, or either, of them, or any part thereof, (although often requested so to do.) But he to do this hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said *A B* and *C* his wife, executrix as aforesaid, or to either of them. To the damage of the said, &c. [As in the last precedent adding profert.]

93. By baron and feme executrix, after marriage.

* 60

Markham and Le Blanc.

Hilary Term, 47 Geo. III.

—, (to wit.) *A B* complains of *C D*, executor of the last will and testament of *E F* deceased, being in the custody, &c. (f) For that whereas the said *E F* in his life-time, to wit, on, &c. at, &c. was indebted, &c. and being so indebted, &c. (laying the promises by the testator.) Yet the said *E F* in his life-time, and the said *C D*, executor as aforesaid since the death of the said *E F*, not regarding, &c. but contriving, &c. have not, nor hath either of them as

94. Against an executor for work, &c. for testator, on promises by him.

(f) See 1 Saund. 112. n. 1. 2.— The form against an executor *de son tort* is the same as above, 1 Saund. 265. In debt, whether by or against an executor or administrator, omit the words, “owes to and.” In the common pleas the form runs as follows: —, (to wit.) *C D* execu-

tor of the last will and testament of *G H* deceased, was attached (or, “summoned,”) to answer *A B* of a plea of trespass on the case, &c. (or as the plea is;) and thereupon the said *A B* by —, his attorney, complains that whereas, &c.

*Y. Relating
to the charac-
ter, &c.*

yet paid the said several sums of money, or any, or either of them, or any part thereof to the said *A B*, (although often requested so to do.) But to pay the same or any part thereof to the said *A B*, the said *E F* in his life-time wholly refused, and the said *C D* executor as aforesaid, hath ever since the death of the said *E F* hitherto wholly refused and still refuses so to do. [*See note, ante, 56. as to the propriety of here adding the following counts on promises by the executor as such to take the case out of the statute of limitations, &c.*] To the damage of the said *A B*, &c.

* 61

95. Against
an executor
on promises
by him in that
capacity.

*And whereas also the said *E F*, deceased, in his life-time, to wit, on, &c. aforesaid, at, &c. aforesaid, was indebted to the said *A B* in the further sum of —*l.* of like lawful money, for the work and labour, care and diligence of the said *A B*, by him the said *A B* before that time done, performed and bestowed in and about the business of the said *E F*, and for the said *E F*, and at his special instance and request, and also in the further sum of —*l.* of like lawful money, for divers goods, wares, and merchandise by the said *A B* before that time sold and delivered to the said *E F*, since deceased, and at his like special instance and request, and also in the further sum of —*l.* of like lawful money, for money by the said *A B* before that time lent and advanced to, and paid, laid out and expended for the said *E F*, and at his like special instance and request, and also in the further sum of —*l.* of like lawful money, for other money by the said *E F* before that time had and received to and for the use of the said *A B*. And the said *E F*, since deceased, in his life-time being so indebted, and the said several sums of money in this count mentioned, being and remaining wholly due and unpaid, the said *C D* as executor as aforesaid, in consideration thereof, afterwards, and after the death of the said *E F*, to wit, on, &c. at &c. aforesaid, undertook, and then and there faithfully promised the said *A B* to pay him the said sums of money in this count mentioned, when he the said *C D* as executor as aforesaid, should be thereunto afterwards requested. And whereas also the said *C D*, as executor as aforesaid, afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid accounted, with the said *A B* of and concerning divers other sums of money from the said *C D* as executor as aforesaid to the said *A B*, before

Account stated by defendant as executor.

that time due and owing, and then in arrear and unpaid, and upon that accounting the said *C D* as executor as aforesaid, was then and there found to be in arrear and indebted to the said *A B* in the further sum of —*l.* of like lawful money, and *being so found in arrear and indebted, and the said last-mentioned sum of money being and remaining wholly unpaid, he the said *C D*, as executor aforesaid, in consideration thereof, afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, undertook, and then and there faithfully promised the said *A B* to pay him the said sum of money last-mentioned whenever, afterwards, he the said *C D*, as executor as aforesaid, should be thereunto requested. Yet the said *C D*, executor as aforesaid, not regarding his said several promises and undertakings, so by him in manner and form aforesaid made, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said *A B* in this respect, hath not yet paid the said several sums of money in the said last three counts mentioned, or any or either of them, or any part thereof to the said *A B*, (although often requested so to do.) But the said *C D*, executor as aforesaid, to pay the same or any part thereof hath hitherto wholly refused, and still doth refuse. To the damage of the said *A B* of —*l.* and therefore he brings his suit, &c.

V. Relating to the character, &c.

* 62

Breach.

Pledges, &c.

In an action against a surviving executor, describe him accordingly at the beginning, and conclude as follows: "Nevertheless the said *E F*, in his life-time, and the said *C D* and one *G H*, in his life-time, now deceased, and whom the said *C D* hath survived, (which said *C D* and *G H*, in the life-time of the said *G H*, were executors of the last will and testament of the said *E F*, deceased,) after the death of the said *E F* and the said *C D*, surviving executor as aforesaid, since the death of the said *G H*, not regarding the said several promises and undertakings of the said *E F*, but contriving, &c. to deceive and defraud the said *A B* in this behalf, have not nor hath any or either of them as yet paid the said several sums of money, or any or either of them, or any part thereof,

26. Against a surviving executor.

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Y. Relating to the character, &c.

* 63

to the said *A B*. But the said *E F* in his life-time, and the said *C D* and *G H*, as executors as aforesaid, after the death of the said *E F*, and in the life-time of the said *G H*, wholly refused, and the said *C D*, surviving executor as aforesaid, hath ever since the death of the said *G H* hitherto wholly refused, and still refuses so to do. To the damage," &c.

97. Against baron and feme executrix before marriage.

A B complains of *C D*, and *E* his wife, (which said *K* is executrix of the last will and testament of *F G*, deceased,) being, &c. For that whereas the said *F G*, in his life-time, to wit, on, &c. at, &c. was indebted, &c. [as in the common case against an executor.] Yet the said *F G*, in his life-time, and the said *E*, executrix as aforesaid, after the death of the said *F G*, and whilst she was sole and unmarried, and the said *C D*, and *E* his wife, (executrix as aforesaid,) since their intermarriage, not regarding the said several promises and undertakings of the said *F G*, but contriving, &c. have not, nor have, nor hath any or either of them as yet paid, &c. (although often requested so to do.) But to pay the same or any part thereof to the said *A B*, the said *F G*, in his life-time, and the said *E*, executrix as aforesaid, after the death of the said *F G*, and whilst she was sole and unmarried, respectively refused, and the said *C D* and *E* his wife, executrix as aforesaid, have ever since their intermarriage, hitherto wholly refused, and still refuse so to do. To the damage, &c.

98. Against baron and feme executrix after marriage.

[As in the last precedent to the conclusion, which is as follows:] Yet the said *F G*, in his life-time, and the said *C D*, and *E* his wife, executrix as aforesaid, since the death of the said *F G*, not regarding the said several promises and undertakings of the said *F G*, but contriving, &c. have not, nor have, nor hath any, or either of them, as yet paid, &c. (although often requested so to do.) But to pay the same, or any part thereof, to the said *A B*, the said *F G*, in his life-time, wholly refused, and the said *C D*, and *E* his wife, (which said *E* is executrix as aforesaid,) have ever since the death of the said *F G* hitherto wholly refused, and still refuse so to do. To the damage, &c.

*FIFTHLY—ADMINISTRATORS.

F. Relating to the character, &c.
99. By an administrator.
(g)

—, (to wit.) *A B*, administrator of all and singular the goods and chattels, rights and credits, which were of *E F*, deceased, at the time of his death, who died intestate, complains of *C D* being, &c. For that whereas the said *C D*, on &c. at, &c. was indebted to the said *E F*, in his life-time, &c. and being so indebted, &c. [*laying the promises to the said E F, in his life-time, and the breach will be as follows:*] Yet the said *C D*, *Breach,* not regarding &c. but contriving, &c. to deceive and defraud the said *E F* in his life-time, and the said *A B*, as administrator as aforesaid, after the death of the said *E F*, (to which said *A B*, after the death of the said *E F*, to wit, on, &c. at, &c. aforesaid, administration of all and singular the goods, chattels and credits, which were of the said *E F*, deceased, at the time of his death, who died intestate, by *Charles*, by Divine Providence, Archbishop of *Canterbury*, primate of all *England*, and metropolitan, in due form of law was granted,)(*h*) in this behalf hath not as yet paid the said sums of money, or any part thereof, to the said *E F*, in his life-time, or to the said *A B*, administrator as aforesaid, since the death of the said *E F*, (although often requested so to do,) but he so to do hath hitherto wholly refused, and still refuses to pay the same or any part thereof, to the said *A B*, administrator as aforesaid. [*It may be advisable here to add counts on promises to the administrator as such and which will run precisely as in the precedent ante, 56. using the word "administrator," instead of executor.*] To the damage of the said *A B*, as administrator as aforesaid of —/ and therefore he brings his suit, &c. And the said *A B* brings *Prolet.* into court here the letters of administration of the said Archbishop (or "Bishop,") &c. *which give sufficient evidence to the said court here, of the grant of administration to the said *A B* as aforesaid, the date whereof is the day and year in that behalf above mentioned, &c. Pledges, &c.

* 65

If the plaintiff be an administrator with the will annexed or *durante minore etate* of an executor or next of kin, he must be described accordingly as in the letters of administration, and in the latter case, at the end of the declaration, there

(g) As to this form, see 5 Wils. (h) The words "*cui pertinet*" are not necessary, Latw. 408.

V. Relating to the character, &c.

must be an averment that the executor or next of kin is under age.

100. By a surviving administrator.

In an action at the suit of a surviving administrator describe him accordingly throughout, and conclude as follows : Yet the said *C D* not regarding, &c. but contriving, &c. to deceive and defraud the said *E F* in his life-time, and the said *A B* and one *G H* in his life-time, now deceased, and whom the said *A B* hath survived, to which said *A B* and *G H*, in the life-time of the said *G H*, and after the death of the said *E F*, to wit, on, &c. at, &c. aforesaid administration, &c. [as in last precedent,] after the death of the said *E F* and the said *A B* as surviving administrator as aforesaid, since the death of the said *G H* in this behalf hath not as yet paid them, or any or either of them, the said several sums of money, or any or either of them, or any part thereof, (although often requested so to do.) But he so to do hath hitherto wholly refused, and still refuses to pay the same, or any part thereof to the said *A B*, surviving administrator as aforesaid. To the damage of the said *A B*, as surviving administrator as aforesaid, of —*l.* and therefore he brings his suit, &c. [Add profert of letters of administration with averment, as in the case of a surviving executor, *ante*, 58, 59.]

101. By an administrator *de bonis non* with will annexed.

* 66

———, (to wit.) *A B*, administrator of all and singular the goods, chattels and credits, which were of *E F* deceased, at the time of his death, left unadministered by **G H*, in his life-time, now deceased, and which said *G H* in his life-time, and at the time of his death, was executor of the last will and testament of the said *E F* deceased, with the will of the said *E F* deceased, annexed, complains of *C D* being, &c. For that whereas the said *C D* on, &c. at, &c. was indebted, &c. Yet the said *C D* not regarding, &c. but contriving, &c. to deceive and defraud the said *E F* in his life-time, and the said *G H* in his life-time, now deceased, and which said *G H* in his life-time, and at the time of his death was executor of the last will and testament of the said *E F* deceased, and the said *A B* after the death of the said *G H*, (to which said *A B* after the respective deaths of the said *E F* and *G H*, to wit, on, &c. at, &c. aforesaid administration of all and singular the goods, chattels and credits which were of the said *E F* deceased, at the time of his death left unadministered by the said *G H* de-

ceased, executor as aforesaid, with the will of the said *E F* annexed, by *Charles*, by Divine Providence, Archbishop of *Canterbury*, primate of all *England*, and metropolitan in due form of law was granted,) in this behalf hath not as yet paid to them, or any or either of them, the said several sums of money, or any or either of them, or any part thereof, (although often requested so to do.) But he so to do hath hitherto wholly refused, and still refuses to pay the same, or any part thereof, to the said *A B*, administrator as aforesaid. To the damage of the said *A B*, as administrator as aforesaid, of —*l.* and therefore he brings his suit, &c. [Add profert of letters of administration.]

V. Relating to the character, &c.

———, (to wit.) *A B*, and *C* his wife, which said *C* is administratrix of all and singular the goods, chattels, rights and credits, which were of *D* deceased, at the time of his death, who died intestate, complains of *E F* being, &c. For that whereas the said *E F* on, &c. at, &c. was indebted, &c. [as in the common case at the suit of an administrator:] Yet the said *E F*, not regarding, &c. but contriving, &c. to deceive and defraud the said *D* in his life-time, and the said *C*, after the death of the said *D*, and * whilst she was sole and unmarried; (to which said *C* whilst she was sole and unmarried, and after the death of the said *D*, to wit, on, &c. at, &c. administration, &c. as ante, 64. in due form of law was granted;) and the said *A B*, and *C* his wife, which said *C* is administratrix as aforesaid, since their intermarriage in this behalf, hath not as yet paid, &c.

102. By baron and feme, administratrix before marriage.

* 67

As in the last precedent to the conclusion, which is as follows: yet the said *E F*, not regarding, &c. but contriving, &c. to deceive and defraud the said *D*, in his life-time, and the said *A B*, and *C* his wife, after the death of the said *D*, (to which said *C* after the death of the said *D*, to wit, on, &c. at, &c. administration, &c. [as before] in due form of law was granted,) in this behalf hath not as yet paid, &c.

103. By baron and feme, administratrix after marriage.

———, (to wit.) *A B*, complains of *C D*, administrator of all and singular the goods and chattels, rights and credits, (i)

104. Against an administrator.

(i) This description is sufficient, 2 Stra. 781.

V. Relating to the character, &c.

of *E F* deceased, at the time of his death, who died intestate being, &c. For that whereas the said *E F*, in his life-time, to wit, on, &c. at, &c. was indebted, &c. (laying the promises by the deceased.) Yet the said *E F*, in his life-time, and the said *C D*, administrator as aforesaid, after the death of the said *E F*, not regarding, &c. but contriving, &c. to deceive and defraud the said *A B*, in this behalf, have not, nor hath either of them as yet paid, &c. (although often requested so to do.) But to pay the same or any part thereof to the said *A B* the said *E F* in his life-time wholly refused, and the said *C D*, administrator as aforesaid, hath ever since the death of the said *E F* hitherto wholly refused, and still refuses so to do. [It may here be expedient to insert counts on promises by the defendant as administrator, as in an action against an executor, *see ante, 60, 61.] To the damage of the said *A B* of —£. and therefore he brings his suit, &c.

* 68

N. B. In an action against an administrator *durante minore etate*, of an executor or next of kin, the same mode of description is to be adopted as in an action at the suit of such an administrator.

*65. Against a surviving administrator.

In an action against a surviving administrator, describe him accordingly at the beginning, and conclude as follows: Yet the said *E F*, in his life-time, and the said *C D*, and one *G H*, in his life-time, now deceased, and whom the said *C D* hath survived, and which said *C D* and *G H*, in the life-time of the said *G H*, were administrators of all and singular the goods, chattels and credits, which were of the said *E F* deceased, at the time of his death, who died intestate, after the death of the said *E F* and the said *C D*, surviving administrator as aforesaid, after the death of the said *G H*, not regarding, &c. but contriving, &c. have not, nor hath either of them as yet paid, &c. (although often requested so to do.) But to pay the same or any part thereof to the said *A B*, the said *E F*, in his life-time, and the said *C D* and *G H*, administrators as aforesaid, after the death of the said *E F*, and in the life-time of the said *G H*, wholly refused, and the said *C D*, surviving administrator as aforesaid, hath ever since the death of the said

G H hitherto wholly refused, and still refuses so to do. To the damage, &c.

V. Relating to the character, &c.

_____, (to wit.) *A B* complains of *C D*, administrator of all and singular the goods, chattels and credits, which were of *E F* deceased, at the time of his death left unadministered by *G H* in his life-time, now also deceased, (and which said *G H* in his life-time, and at the time of his death, was executor of the last will and testament of the said *E F* deceased,) with the will of the said *E F* annexed, being, &c. For that whereas the said *E F* in his life-time, to wit, on, &c. at, &c. was indebted, &c. Yet the said *E F* in his life-time, and the said *G H* in his life-time, now deceased, after the death of the said *E F*, and which said *G H*, in his life-time, and at the time of his death, was executor of the last will and testament of the said *E F* deceased, and the said *C D*, administrator as aforesaid, after the death of the said *G H*, not regarding, &c. have not, nor have, nor hath any or either of them as yet paid, &c. (although often requested so to do.) But to pay the same or any part thereof to the said *A B* the said *E F* in his life-time, and the said *G H*, executor as aforesaid, in his life-time and after the death of the said *E F* respectively refused, and the said *C D*, administrator as aforesaid, hath ever since the death of the said *G H* hitherto wholly refused, and still refuses so to do. To the damage, &c.

106. Against an administrator *de bonis non*.

* 69

_____, (to wit.) *A B* complains of *C D*, and *E* his wife, which said *E* is administratrix, &c. of *G H* deceased, at the time of his death, who died intestate, being, &c. For that whereas the said *G H*, in his life-time, to wit, on, &c. at, &c. was indebted, &c. Yet the said *G H*, in his life-time, and the said *E*, administratrix as aforesaid, after the death of the said *G H* and whilst she was *sole* and unmarried, and the said *C D*, and *E* his wife, (which said *E* is administratrix as aforesaid,) since their intermarriage not regarding, &c. but contriving, &c. have not, nor have, nor hath any or either of them as yet paid, &c. although often requested so to do, but to pay the same or any part thereof to the said *A B* the said *G H* in his life-time, and the said *E*, administratrix as aforesaid, after the death of the said *G H*, and whilst she was *sole* and unmarried

107. Against baron and feme, administratrix *before marriage*.

*V. Relating
to the charac-
ter, &c.*

respectively refused, and the said *C D*, and *E* his wife, administratrix as aforesaid, have ever since their intermarriage hitherto wholly refused, and still refuse so to do. To the damage, &c.

108. Baron
and feme, ad-
ministratrix
after mar-
riage.

* 70

As in the last precedent to the conclusion, which is as follows: Yet the said *G H* in his life-time, and the said *C D*, and *E* his wife, which said *E* is administratrix as aforesaid, since the death of the said *G H* not regarding, &c. but contriving, &c. have not, nor have, nor hath any or either of them as yet paid, &c. although often requested so to do. But to pay the same or any part thereof to the said *A B* the said *G H* in his life-time wholly refused, and the said *C D*, and *E*-his wife, which said *E* is administratrix as aforesaid, have ever since the death of the said *G H* hitherto wholly refused, and still refuse so to do. To the damage, &c.

* 71

*II. SPECIAL COUNTS.

1. On a policy
of insurance
on goods lost
by capture, at
the suit of the
broker.(k)

The policy.

FOR that whereas the said *A B*,(l) heretofore, to wit, on, &c.(m) at, &c.(n) according to the usage and custom of merchants, caused to be made a certain policy of insurance,(o) purporting thereby and containing therein, that the said *A B* (or if effected by an agent for the plaintiff, say, "that the said *E F*,"(p) as well in his own name, as for and in the name

(k) By observing the following notes, this precedent may be applied to a policy on *ship or freight*, &c. or to an action by the principal.

(l) This action may be brought in the name of the person interested, or of the person in whose name the policy was effected, Park. 403. Marshal, 589. If brought in the name of the party interested, on a policy effected in the name of an agent, the declaration states that the plaintiff "by one *E F* his agent in that behalf," made, &c. and sometimes

shews that the requisites of the stat. 28 Geo. III. c. 56. have been complied with, as in 1 B. & P. 345. Marshal, 212. and note (z) post, 72.

(m) The date of the policy in the margin, Park. 27. Marshal, 241.

(n) The venue where the cause is to be tried.

(o) The statute 35 Geo. III. c. 63. s. 11. enacts, that the instrument shall be called a "policy of insurance."

(p) The word agent, needs not be inserted in the policy, 1 B. & P. 348.

and names of all and every other person or persons to whom the same did, might, or should appertain in part, or in all, did make insurance and cause, &c. [*here set out the policy in the past tense to the words, "in witness," &c. which are to be omitted and then proceed as follows :*(g)] And by a certain memorandum thereunder written, corn, fish, salt, fruit, flour and seed, were warranted free from average, unless general, or the ship should be stranded; sugar, tobacco, hemp, flax, hides and skins, were warranted free from average, under 5/10 per cent. and all other goods; also the ship and freight were warranted free from average, under 2/10 per cent. unless general, or the ship should be stranded.(r) And by a certain other memorandum thereunder written, it was declared, that the said insurance was on goods.(s) As by the said policy of insurance and memoranda, reference being thereunto had, will more fully and at large appear. And the said *A B* in fact saith, that the said policy of insurance and memoranda, were so made by him the said *A B*, as aforesaid, as the agent of one *E K*, and for his use and benefit, and that he the said *A B* did receive the order for, and effect the said policy of insurance as such agent as aforesaid, to wit, at, &c. as aforesaid.(t) Of all which said premises he the said *C D* afterwards, to wit, on, &c.(u) at, &c. aforesaid, had

I. On Policy.
Over.

Common memorandum.

* 72

Insurance on goods.

Reference to policy.

Policy made by plaintiff as agent.

Notice to defendant.

(g) This instrument has always been considered as ill-framed, 4 T. R. 210. Burr. 348. 1555. 5 East, 578. The policy is to be set forth with the blanks, 1 Went. 409. See the general rule as to construing it, 4 East, 135.

(r) This is the common memorandum at the foot of the policy, see Park, 29, 21. 101. Marshall, 240. as the memorandum is part of the policy, its contents may be so stated without adopting the word "memorandum."

(s) The general terms of the insurance in the printed part of the policy, are qualified by the insertion, either in the body or at the foot of the policy, of the words "on ship,"

or "on goods," or "on freight," &c. and when inserted at the foot, such memorandum is described as in the precedent.

(t) When the declaration is at the suit of the principal, this averment, to be omitted. As to this averment, see 28 Geo. III. c. 56. 1 B. & P. 317. 315. If the policy be effected in the name of a firm, it may be expedient to aver, that it is the usual firm of the plaintiffs, as in 1 B. & P. 317. 345. As, however, at common law, these requisites did not exist, it seems that they need not be averred in pleading. 1 Saund. 276. n. 2. Sir T. Bay. c. 450.

(u) The date of the defendant's subscription at the foot of the policy

1. On Policies.
Mutual promises.

notice. And thereupon afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, in consideration that the said *A B*, at the special instance and request of the said *C D*, had then and there paid to the said *C D* a certain sum of money, to wit, the sum of 5*l.* 5*s.* of lawful money of *Great Britain*, as a premium or reward for the insurance of 100*l.* of and upon the said goods, in the said ship or vessel, in the said voyage, (or "on the premises,") in the said policy of insurance mentioned, and had then and there undertaken and faithfully promised the said *C D* to perform and fulfil all things in the said policy of insurance, contained on the part and behalf of the insured, *to be performed and fulfilled, he the said *C D* undertook, and then and there faithfully promised the said *A B* that he the said *C D* would become and be an insurer to the said *A B* of the said sum of 100*l.* upon the said goods,(*x*) in the said ship or vessel, in the said voyage, in the said policy of insurance mentioned, and would perform and fulfil all things in the said policy of insurance mentioned, on his part and behalf as such insurer of the said sum of 100*l.* to be performed and fulfilled. And the said *C D* then and there became and was an insurer to the said *A B* and then and there duly subscribed (or if by agent, "by one *G H* his agent in that behalf duly subscribed") the said policy of insurance, as such insurer of the said sum of 100*l.* upon the said goods, in the said ship or vessel, in the said voyage to wit, at, &c. aforesaid. And the said *A B* further saith, that heretofore, to wit, on, &c.(*y*) aforesaid, divers goods of great value, had been and were shipped and loaded at *London* aforesaid,(*z*) in and on board of the said ship or vessel in the said policy of insurance mentioned,(*a*) to be carried and conveyed therein, in the said voyage, to wit, at, &c. aforesaid. And that the said *E F*, (or if at the suit of the principal, that

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Defendant's
subscription
of the policy.

Goods ship-
ped.

Interest of in-
sured.

(*x*) "Or freight of the said ship or vessel, in the said voyage."

(*y*) This averment is omitted when the insurance is on ship. Sometimes it is stated that the goods were put on board *after* the making of the policy, and which allegation needs not be proved as laid, 6 T. R. 496. but the averment, in the above precedent seems preferable.

(*z*) Or any other port from which the insurance was to take effect. As to this averment, see 2 B. & P. 153.

(*a*) If the insurance were on freight, here say, "to be carried and conveyed on freight in and on board aforesaid ship or vessel in the said voyage."

"he the said *A B*,") was then and there, and from thence continually afterwards, until and at the time of the loss hereafter mentioned, interested in the said goods in the said policy of insurance and memoranda mentioned, to a large value and amount, to wit, to the value and amount of all the monies by him ever insured or caused to be insured thereon, to wit, at, &c. aforesaid. (b) *And the said *A B* in fact further saith, that heretofore, to wit, on, &c. (c) the said ship or vessel, with the said goods on board thereof, departed and set sail from — aforesaid, (d) on her said voyage, towards —, aforesaid (e) And that afterwards and whilst the said ship or vessel was proceeding on her said voyage, and before her arrival at — aforesaid, to wit, on, &c. the said ship or vessel with the said goods on board thereof, as aforesaid, were on the high seas, to wit, at, &c. aforesaid, (f) with force and arms, and in a hostile manner, captured, seized and taken by certain enemies of our lord the now king. (g) And thereby the said goods then and there became and were wholly lost to the said *E F*, (h) and never did

I. On P&B.
cis

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Ship sails.

Her capture.

The total loss.

(b) As to this averment, see Marshall, 587. &c. and quere if it be in any case necessary, 2 East, 392. 4 East, 408. 1 Sand. 276. n. 2. If the interest be stated, it should be alleged, that the insured was interested in the goods, not only at the time of the loss, but also at the time of making the insurance, 2 B. & P. 155. If the declaration state that two of three partners were interested, it will be no ground of non-suit, 2 B. & P. 210. In a declaration on a policy on a foreign ship, not the property of the king or of any of his subjects, there should be an averment to that effect, in lieu of an averment of interest, 2 East, 385. 392. 4 East, 396. 398. n. b. What is sufficient proof of interest in the ship, 4 East, 136.

(c) This seems preferable to the allegation, that after the making, &c. 5 T. R. 496.

(d) The place from which the

voyage was to commence, 2 B. & P. 153.

(e) The place of final destination. If there were any warranty, the compliance with it should here be shewn. Marshall, 588. If the policy were on freight, here insert, "and that the freight of the said goods, in case of her arrival there, would have amounted to a large sum of money, to wit, the sum of — £"

(f) 2 B. & P. 153.

(g) As to the loss, see Marshall, 588. In stating the loss, the pretest should be consulted, and such loss should be stated precisely as it can be proved, and it must appear to be within the terms of the policy, see Park, 398 to 403. and Marshall, 591 to 596. 4 B. & P. 28. See the description of several losses, in 1 Wentw. 389 to 465.

(h) The person interested. A partial loss may be given in evidence under a count for a total loss, see Park, 399. Marshall, 629.

I. On Policies.
Notice to defendant.

arrive at, &c. aforesaid. (i) Of all which *said several premises, the said *C D* afterwards, to wit, on, &c. at, &c. aforesaid, had notice and was then and there requested by the said *A B* to pay him the said sum of 100*l.* so by him insured as aforesaid, and which said sum of 100*l.* he the said *C D* then and there ought to have paid, according to the form and effect of the said policy of insurance, and his said promise and undertaking so by him made as aforesaid, to wit, at, &c. aforesaid.

If there be any doubt as to the interest, or as to the nature of the loss, other counts may be added, varying the statement; and in such case it seems unnecessary to set out the policy again in the second count which may refer to the first. An adjustment may be given in evidence under the general count, Park, 118. Marshall, 544. 588, 589. Add the counts for money paid, if there be a demand for general average, and for money had and received if the premium be recoverable, and the account stated.

2. On a wager on a horse-race for a hunter's sweep-stakes. (k)

For that whereas before, and at the time of the making of the agreement and the promise, and undertaking of the said *C D* hereinafter next mentioned, a certain race for a hunter's sweepstakes, amounting to a large sum of money, to wit, the sum of —*l.* was about to be run over the *Nottingham* course, to wit, at —, and it was then and there expected that a certain horse, called —, and also certain other horses would run the said race over the said *course, for the said stakes, and thereupon heretofore, to wit, on, &c. at, &c. aforesaid, it was agreed by and between the said *A B* and the said *C D*, that if the said horse, called —, in running the said race, should beat the said other horses which should run the said race, over the said course, for the said stake, he the said *C D*

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(i) If on freight, here insert, "and the said *E F* thereby lost and was deprived of the freight of the said goods and merchandise, so on board the said ship on freight as aforesaid, to wit, at, &c. aforesaid.

(k) As to horse-races and wagers thereon, see 4 T. R. 1. 2 B. & P. 51. Wagers are in general legal, 3 T. R. 693. 1 Salk. 366. n. but such as militate against general policy, as a wager between voters on the event of an election, (1 T. R. 56.) or on the

event of a war, (7 T. R. 535. 1 T. R. 57.) or concerning the produce of any particular branch of the revenue, as of the hop duties, are void, (2 T. R. 610. 2 B. & P. 130.) Cricket, or a horse-race, or a foot-race against time, is a game within the 9 Ann. c. 14. s. 1. 1 Wils. 220. 2 Wils. 36. but a sum under 10*l.* won at cards is recoverable. 1 Esp. Rep. 235. Wagers, prejudicial to the interests or feelings of a third person, as on the sex of a person, are illegal, Cowp. 729.

should pay to the said *A B* the sum of —*l.* of lawful money of *Great-Britain*; but that if the said horse called —, should be beaten by any or either of the said other horses which should run, as aforesaid, he the said *A B* should pay to the said *C D* the sum of —*l.* of like lawful money. And the said agreement being so made as aforesaid, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration thereof, and that the said *A B*, at the special instance and request of the said *C D*, had then and there undertaken, and faithfully promised the said *C D* to perform and fulfil the said agreement, in all things on his part and behalf to be performed and fulfilled; he the said *C D* undertook, and then and there faithfully promised the said *A B* to perform and fulfil the said agreement, in all things on his part and behalf to be performed and fulfilled. And the said *A B* in fact saith, that after the making of the said agreement, to wit, on, &c. at the *Nottingham* course, aforesaid, to wit, at, &c. aforesaid, the said race, for the said stakes was run between the said horse called —, and divers, to wit, — other horses; and that in running the said race, the said horse called —, did be at the said other horses so running, as aforesaid, whereof the said *C D* afterwards, to wit, on, &c. at, &c. aforesaid, had notice; yet the said *C D* not regarding the said agreement, nor his said promise and undertaking so by him made as aforesaid, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said *A B* in this behalf, hath not as yet paid the said sum of —*l.* or any part thereof, to the said *A B*, although often requested so to do; but hath hitherto wholly neglected and refused, and still neglects and refuses so to do, to *wit, at &c. * 77 aforesaid. (I) [If the precise terms of the race or of the bet be

*It On Ho-
neys.*

*Mutual prom-
ises.*

[1] See the variety of precedents in *Wentworth's Index*, vol. 2. In an action against the loser of a wager, it is necessary to state in the declaration the special circumstances, and the wager cannot be recovered from him under an *indebitatus* count, 6 Mod. 123. 12 Mod. 81. 3 Lev. 115. Carth. 228. 1st Raym. 69. Salk. 23. 3 T. R. 704. But the stake may be recovered from the stakeholder upon a common count for money had and received, 6 Mod. 128. 12 Mod. 81.

In the declaration against the loser, mutual promises should be stated, and though it has been usual to allege that a discourse was had, &c. as in the case of feigned issues, (3 T. R. 693.) that form is unnecessary, and it is sufficient to state as inducement, the expectation of the event upon which the parties betted, and then to show the agreement, &c. of the parties, with other proper averments of the events on which the right of action depends.

III. On Feigned Issues.

question did arise as aforesaid, and that he the said *C D* did undertake and promise, in manner and form as the said *A B* hath above in that behalf alleged. Nevertheless, for plea in this behalf, the said *C D* saith, that for every, &c. [*negating the first assertion in italics,*] in manner and form as the said *A B* hath above in that behalf alleged, and of this the said *C D* puts himself upon the country, and the said *A B* doth the like; therefore, &c. (*award of venire as in common cases.*)

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4. On a parol submission to an award. (*n*)

For that whereas before the making of the promise and undertaking of the said *C D* hereinafter next mentioned, certain differences had arisen and were then depending between the said *A B* and the said *C D*, touching and concerning (*o*) *certain books before then sold by the said C D, as the agent of and for the said A B, at, &c.* And thereupon for the putting an end to the said differences, the said *A B* and the said *C D* heretofore, to wit, on, &c. at, &c. respectively, (*p*) submitted themselves to the award of one *E F*, to be made between them, of and concerning the said differences, and in consideration thereof, and that the said *A B* at the special, &c. of the

(*n*) See the precedents, 1 Wentw. 90 to 100. and vol. 2. Index. 2 Rich. Prac. C. P. 137. Mod. Ent. 165. 1 Saund. 28. 8 T. R. 571. There are early instances of the action of *assumpsit* on a parol submission, 1 Saund. 28. 8 T. R. 571. When the submission is by deed, the remedy is by debt or covenant, unless the award be made after the limited time, (3 T. R. 592.) Debt on a parol submission is frequently most advisable when the award is merely for the payment of money and the whole sum is due; see a precedent in debt, 2 Saund. 61. 127, 128. But if there be any other demand, more properly the subject of an action of *assumpsit*, which may be joined with the demand on the award; or if the award were not merely for the payment of money, or for the payment of money

by instalments, not all due, declare in *assumpsit*, 2 Saund. 62. b. 1. n. 5. The declaration may either state or omit the subject matter of the dispute, though it is more usual to state it, 2 Saund. 61. h. n. 1. The assent of a party to submit a matter to arbitration, is a sufficient consideration, even though he had no cause of action, 1 Leon. 103. 4 Leon. 31.

(*o*) Or, "divers sums of money due and owing from the said *C D* to the said *A B*." It is not necessary to state the cause of dispute. See note (*n*).

(*p*) Declarations on awards must state a mutual submission. If the action were brought on an arbitration bond, it is otherwise, for the defendant by praying *oyer*, shews that there was a mutual submission, 2 Saund 61. h. n. 2. 2 Stra. 925.

said *C D* had then and there undertaken, &c.(g) the said *C D* to perform and fulfil the award of the said *E F*, to be so made between the said *A B* and *C D*, of and concerning the said differences in all things therein contained on his part and behalf, to be performed and fulfilled, he the said *C D* undertook, and then and there faithfully promised the said *A B* to perform and fulfil the said award in all things therein contained, on his part and behalf, to be performed and fulfilled. And the said *A B* in fact saith, that the said *E F* having taken upon himself the burthen of the said arbitrament, afterwards, to wit, on, &c. at, &c. aforesaid, made his certain award(r) between the said *A B* and the said *C D*, of and concerning the said differences,(s) and did thereby them and there award(t) that the said *C D* should, on, &c. pay to the said *A B* the sum of 100*l.* in full satisfaction and discharge of the said matters in difference, of which said award the said *C D*, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, had notice.(u) And although he the said *C D* afterwards, to wit, on, &c. at, &c. was requested by the said *A B* to pay him the said sum of 100*l.* according to the tenor and effect of the said award, and his said promise and undertaking. Yet the said *C D* not regarding his said promise and undertaking, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said *A B* in this behalf, did not, nor would when he was requested as aforesaid, or at any time afterwards, pay the said sum of 50*l.* or any part thereof to the

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(g) The mutual submission implies mutual promises to observe the award, 11 Mod. 170.

(r) The award in pleading must be stated to have been made agreeably to the submission—as if the submission were, “so that the award be made in writing,” &c. it must be stated to have been so made, 2 Saund. 62. n. 3.

(s) What is a sufficient allegation that it was so made, see 2 Ventr. 242. Kyd on Awards, 291.

(t) The plaintiff need not in a

declaration, state more of the award than is relative to his case, unless where there is a condition precedent, performance of which must be averred, 2 Saund. 62. b. n. 5. 1 Burr. 278. 1 Salk. 72.

(u) This averment is unnecessary; for one party is as much bound to take notice of the award as the other, unless the stipulation be that the award shall be notified to the parties, in which case notice must be averred, 2 Saund. 62. a. n. 4.

IV. On Parol awards.

said *A B*, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do, to wit, at, &c. aforesaid. [Add counts on the plaintiff's original demand referred to arbitration—the account stated—and breach.](*x*)

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5. On a promise to pay the costs of an action within a week, in consideration of plaintiff staying proceedings.

*For that whereas before the making of the promise and undertaking of the said *C D*, hereinafter next mentioned, a certain action had been commenced and prosecuted by and at the suit of the said *A B* against the said *C D*, in the court of our lord the now king, before the king himself, for the recovery of a certain sum of money, to wit, the sum of —*l.* then and at the time of the making of the promise and undertaking of the said *C D*, hereinafter next mentioned, due and owing from the said *C D* to the said *A B*.(*y*) And which said action at the time of the making of the said promise and undertaking of the said *C D* hereinafter next mentioned, was depending in the said court, to wit, at, &c. aforesaid, whereof the said *C D* then and there had notice. And thereupon heretofore, to wit, on, &c. at, &c. aforesaid, in consideration of the premises, and that the said *A B* at the special instance and request of the said *C D* would cease to prosecute the said action, and would stay all further proceedings therein, he the said *C D* undertook, and then and there faithfully promised the said *A B* to pay the costs of commencing and prosecuting the said action in a week then next following. And the said *A B* avers, that he, confiding in the said promise and undertaking of the said *C D*, did then and there cease to prosecute the said action, and hath thence hitherto stayed all further proceedings therein. And that the costs of commencing and prosecuting the said action amounted to a large sum of money, to wit, the sum of —*l.* of lawful, &c. whereof the said *C D* afterwards, to wit, on, &c. at, &c. had notice. And although a week from the time of the ma-

(*x*) It has been decided, that the award, when there is a parol submission, may in most cases be given in evidence under the common count founded on the original debt, or on the account stated, *Peake, C. N. P.* 227. 1 *Esp. Rep.* 194. 5 *T. R.* 6.

(*y*) It is not necessary to state the subject matter of the debt, *Com. Dig. tit. Action on the Case on Assumpsit*, H. 3. though it must be shewn that there was some cause of action against the defendant, or some other person, 4 *East*, 455. 1 *New Rep.* 172

king the said promise and undertaking of the said *C D* hath long since elapsed, to wit, at, &c. aforesaid. Yet the said *C D* not regarding, &c. hath not as yet paid the said costs of commencing and prosecuting the said action, or any part thereof, (although he the said *C D* afterwards, and after the expiration of a week from the time of making his said promise and undertaking, to wit, on, &c. at, &c. aforesaid, was requested by the said *A B* so to do.) But he so to do hath hitherto wholly neglected and refused, and still doth neglect and refuse, to wit, at, &c. aforesaid. [Add a count on the original debt—money paid—the account stated—and the usual breach applicable to those counts only.]

V. Forbearance of defendant.

* 83

For that whereas one *E F* before and at the time of the making of the promise and undertaking of the said *C D* herein-after next mentioned, was indebted to the said *A B* in a certain sum of money, to wit, the sum of —*l.* of lawful, &c.(a) to wit, at, &c. and thereupon heretofore, to wit, on, &c. at, &c. in consideration of the premises, and that the said *A B* at the special instance and request of the said *C D* would forbear and give time to the said *E F* for the payment of the said sum of —*l.* until the — day of —, (b) he the said *C D* undertook, and then and there faithfully promised(c) the said *A B* to pay him the said sum of —*l.* on, &c. And the said *A B*

6. On a promise to pay the debt of a third person, in consideration of forbearance.(z)

* 84

(z) See precedents of these declarations, 2 Wentw. 405. &c. and Index to ditto.

(a) It is not necessary to state the subject matter of the debt, though a demand recoverable at law or in equity, must be stated; ante 82. n. (y).

(b) The mere promise of a third person to pay the debt of another, without a stipulation by the plaintiff to forbear, or some other new consideration, is not valid, 1 Saund. 211. n. Com. Dig. Action on the Case on *Assumpsit*, B. 1, 2. The promise of an heir, who has no assets by descent, to pay the debt of his ancestor on consideration of forbearance, is not binding, 2 Saund. 137. Com. Dig.

Action of *Assumpsit*, F. 8. 4 East, 455. See the form of declaring against an heir, 2 Saund. 135. but a promise by an executor, in consideration of forbearance, is valid, though he have no assets at the time, because by the forbearance the plaintiff is precluded from obtaining judgment of assets, *quando acciderint*. *Id. ibid.*

(c) Though the promise must, under the stat. 29 Car. II. c. 3. s. 4. be in writing, and the whole consideration must be stated in such writing, see 5 East, 10. it needs not be so stated in the declaration, 1 Saund. 276. n. 1.

VI. Forbearance of third person.

avers, that he, confiding in the said promise and undertaking of the said *C D*, so made as aforesaid, did forbear and give time to the said *E F* for the payment of the said sum of —*l.* until the said — day of —, to wit, at, &c. aforesaid, whereof the said *C D* afterwards, to wit, on the day and year last aforesaid, there had notice, and thereby and according to the tenor and effect of his said promise and undertaking, he the said *C D* became liable to pay to the said *A B* the said last-mentioned sum of —*l.* on the said — day of —, to wit, at, &c. aforesaid. [Add counts for money had and received—and on an account stated.]

7. On a promise to pay money in consideration of the exchange of horses.

For that whereas heretofore, to wit, on, &c. at, &c. in consideration that the said *A B* at the special instance and request of the said *C D* would deliver to him the said *C D*, a certain horse of him the said *A B*, of great value, in exchange^(d) for a certain horse of him the said *C D*, he the said *C D* undertook, and then and there faithfully promised the said *A B* to deliver the said horse of him the said *C D* to him the said *A B*, and to pay him a certain sum of money, to wit, the sum of —*l.* of lawful money of *Great Britain*, in exchange for the said horse of the said *A B*, and the said *A B* avers, that he, confiding in the said promise and undertaking of the said *C D*, did afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, deliver to the said *C D* the said horse of him the said *A B*, and although the said *C D* in part performance of his said promise and undertaking, did then and there deliver to the said *A B* the said horse of him the said *C D* in exchange for the said horse of him the said *A B*. Yet the said *C D* not further regarding *his said promise and undertaking, hath not although often requested so to do, as yet paid to him the said *A B* the said sum of —*l.* or any part thereof, but hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do, to wit, at, &c. aforesaid. [Add a count “for horses, mares and geldings, bargained and sold,” and “for horses, &c. sold and delivered,” and the account stated—and breach.]

* 85

(d) For the distinction between a Com. 446. 3 Salk. 157. sale and an exchange, see § 81.

For that whereas heretofore, to wit, on, &c. at, &c. in consideration that the said *A B*, at the special instance and request of the said *C D*, would sell and deliver to him the said *C D*, a certain quantity, to wit, 100 sacks of malt, at a certain rate or price, then and there agreed upon between the said *A B* and the said *C D*, to wit, at the rate or price of —*l.* for each and every of the said sacks of malt, amounting in the whole to a large sum of money, to wit, the sum of —*l.* of lawful money of *Great Britain*, he the said *C D* undertook, and then and there faithfully promised the said *A B* to pay him for the said malt by a good bill or bills of exchange, payable in four months from the delivery of the said malt, to him the said *C D*, whenever after such delivery, he the said *C D* should be thereto requested, and the said *A B* in fact saith, that he confiding in the said promises and undertaking of the said *C D*, did afterwards, to wit, on, &c. at, &c. aforesaid, sell and deliver the said quantity of malt, to the said *C D*, on the terms aforesaid, and although the said *C D* in part performance of his said promise and undertaking, afterwards, to wit, on, &c. at, &c. aforesaid, paid to the said *A B* by a certain bill of exchange, a part of the said price of the said malt, to wit, the sum of 100*l.* and although the said *A B* afterwards and before the expiration of four months from the delivery of the said malt as aforesaid, to wit, on, &c. aforesaid, at, &c. aforesaid, requested the said *C D*, to pay him the said *A B*, the residue of the said price of the said malt, by such bill or bills of exchange as aforesaid, yet the said *C D* not regarding his said promise and undertaking, but contriving and wrongfully and unjustly intending, craftily and subtly to deceive and defraud the said *A B* in that behalf, did not nor would when he was so requested as aforesaid, or at any time before or afterwards, pay the said *A B* the residue of the said price of the said malt or any part thereof,

8. For not delivering a bill of exchange in payment for goods sold. (e)

* 86

(e) When goods are sold on a credit not elapsed at the time of declaring, and on the terms that the defendant should deliver a bill of exchange to the plaintiff, or accept a bill in his favour, it is necessary to declare specially for not delivering or accepting the bill, as in this prece-

dent, 4 East, 147. but if the credit be elapsed at the time of declaring, though after the writ issued, and after the first day of term, the plaintiff may recover on the common counts, the declaration being entitled specially of a day after the credit, elapsed, 4 East, 75.

VIII. Not delivering a bill of exchange.

by a good bill or bills of exchange, payable in four months from the delivery of the said malt as aforesaid or otherwise, howsoever, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do, and by reason thereof, he the said *A B* hath lost and been deprived of the use and benefit of the bill or bills of exchange, which he the said *C D* ought to have delivered to the said *A B* as aforesaid, to wit, at, &c. aforesaid. [If there be any doubt as to the terms of the contract, add another special count, stating the facts as they will probably be proved. Add two counts for goods bargained and sold—and sold and delivered—and the account stated.]

9. On a promise to be accountable for goods sold to a third person. (S)
* 87

For that whereas heretofore, to wit, on, &c. at, &c. in consideration that the said *A B* at the special instance and request of the said *C D*, would sell and deliver to one *E F* on credit, all such goods as he the said *E F* should have occasion for and require of the said *A B* in the way of his the said *A B*'s trade and business of a hemp merchant, he the said *C D*, undertook, and then and there faithfully promised the said *A B* to be accountable to him the said *A B* for whatever goods he the said *A B* should sell and deliver to the said *E F* as aforesaid. And the said *A B* avers, that he, confiding in the said promise and undertaking of the said *C D*, did afterwards, to wit, on, &c. at, &c. aforesaid, sell and deliver to the said *E F* on certain credit, then and there agreed upon between the said *A B* and *E F*, certain goods of great value, which he the said *E F*, then and there had occasion for and required of the said *A B* in the way of his the said *A B*'s said trade and business, and at and for certain reasonable prices then and there agreed upon by and between the said *A B* and the said *E F*, (or if no stipulated price, say, "at and for certain reasonable sums of

(f) Whenever the defendant is collaterally liable to pay for goods, &c. furnished to a third person (for the criterion of which, see 2 T. R. 80, 81.) his undertaking must be in writing under the 29 Car. II. c. 3. s. 4. and must state the consideration of the defendant's undertaking, 5 East, 10. 1 Saund. 211. a. and the declara-

tion must be special as above, and not merely for goods sold and delivered to the defendant, or bargained and sold to him, and delivered to a third person at his request, 1 Saund. 211. a. b. but the declaration needs not state that the contract was in writing, 1 Saund. 276. a. 1.

money amounting," &c.) amounting in the whole to a large sum of money to wit, the sum of —*l.* of lawful money of *Great Britain*, and that although the said credit and the time for payment of the price of the said goods, by the said *E F* to the said *A B* hath long since elapsed, yet the said *E F* hath not (although often requested so to do) as yet paid the said sum of —*l.* or any part thereof, but hath hitherto wholly neglected and refused so to do, to wit, at, &c. aforesaid, of all which said premises the said *C D* afterwards, to wit, on, &c. aforesaid, there had notice. Yet the said *C D*, not regarding his said promise and undertaking, but contriving, &c. hath not as yet accounted to him the said *A B* or paid him the said sum of money or any part thereof, for the said goods, or any part thereof, (although he the said *C D* afterwards, to wit, on, &c. at, &c. aforesaid, was requested by the said *A B* so to do,) and hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do, and the said sum of —*l.* still remains wholly due and unpaid to the said *A B*, to wit, at, &c. aforesaid. [*Add such special counts as may be necessary, varying the statement of the promise, and of the averments, so as to meet the evidence, and if there be any doubt whether the defendant be immediately liable, add counts for goods bargained and sold—and sold and delivered—money had and received—and on an account stated.]

IX. To pay for goods sold to another.

* 88

For that whereas heretofore, to wit, on, &c. at, &c. in consideration that the said *A B* for the accommodation and at the special, &c. of the said *C D*, would accept a certain bill of exchange in writing, bearing date the day and year aforesaid, and made and drawn by the said *C D* on the said *A B*, and where-

10. By acceptor of a bill of exchange for the accommodation of defendant for not providing money for payment thereof, &c. (S)

(S) See a similar action and the pleadings, 3 Wils. 346. A contract to indemnify is generally implied, as on the part of a defendant to indemnify a person who becomes bail for him, 3 Wils. 262. or surety for him at his request, 2 T. R. 105. 7 T. R. 568. 2 B. & P. 268. If the thing to be done be obviously illegal, no contract to indemnify can be implied, but otherwise where the act is not apparently

illegal, 3 T. R. 186. When the debt of the principal has been paid by the surety, a common count for money paid is sufficient; but when a surety has not actually paid the debt in money, but has only given security for it, or he has sustained any costs or damage, the declaration should be special, 3 East, 169. 3 T. R. 610. 7 T. R. 204.

X. To indemnify.

by the said *C D* required the said *A B* two months after the date thereof, to pay to the order of him the said *C D*, the sum of 50*l.* as for value received,^(h) and would deliver the same so accepted to the said *C D*, in order that he the said *C D* might negotiate the same for his own proper use and benefit, he the said *C D* undertook, and then and there faithfully promised the said *A B* to provide money for the payment of the said bill of exchange when the same should become due and payable, and to indemnify and save harmless the said *A B* from any loss or damage, for or by reason of his acceptance of the said bill of exchange as aforesaid, and the said *A B* avers, that he, confiding in the said promise and *undertaking of the said *C D* did afterwards, to wit, on, &c. at, &c. aforesaid, accept the said bill of exchange, and deliver the same so accepted to the said *C D*, for the purpose aforesaid, and although the said bill of exchange so accepted as aforesaid, was afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, negotiated by the said *C D* for his own proper use and benefit, and the same hath long since become due and payable, to wit, at, &c. aforesaid. Yet the said *C D* not regarding his said promise and undertaking, but contriving and fraudulently intending craftily and subtly to deceive, &c. in this behalf, did not, nor would provide money for the payment of the said bill of exchange when the same became due and payable, nor indemnify or save harmless him the said *A B* from any loss or damage, for or by reason of his acceptance of the said bill of exchange as aforesaid, but wholly neglected and refused so to do. By means and in consequence whereof, the said *A B*, as such acceptor of the said bill of exchange as aforesaid, afterwards, to wit, on, &c. at, &c. aforesaid, was called upon, and forced, and obliged to pay, and did then and there pay to one —, the holder thereof, the said sum of money in the said bill of exchange specified, together with certain interest thereon, and the costs of a certain action before then brought on the said bill of exchange by the said —, before then brought in the court of our said lord the king, of —, against the said *A B*, in the whole amounting to a large sum of mo-

(h) The bill of exchange is to be described according to its legal effect.

ney, to wit, the sum of —*l.* of lawful, &c. and by means of the said several premises the said *A B* hath been and is damaged to the amount thereof, to wit, at, &c. aforesaid. [Add all the money counts—and account stated—and common breach applicable to those counts.] *X. To indemnify.*

For that whereas heretofore, to wit, on, &c. (i) at, &c. in consideration that the said *A B* being then and there **sole* and unmarried, at the special, &c. of the said *C D* had then and there undertaken, and faithfully promised the said *C D* to marry him the said *C D* when she the said *A B* should be thereunto afterwards requested, he the said *C D* undertook, and then and there faithfully promised the said *A B* to marry her the said *A B*, when he the said *C D* should be thereunto afterwards requested, and the said *A B* avers, that she, confiding in the said promise and undertaking of the said *C D*, hath always from thence hitherto remained and continued, and still is, *sole* and unmarried, and hath been, for and during all the time aforesaid, and still is, ready and willing to marry him the said *C D*, to wit, at, &c. aforesaid.† [If the defendant have married another woman, no request need be averred, but at the obelisk the following allegation should be inserted: “Yet the said *C D* not regarding, &c. but contriving, &c. after the making of his said promise and undertaking, to wit, on, &c. at, &c. aforesaid, wrongfully and injuriously married a certain other person, to wit, one —, contrary to his said promise and undertaking, to wit, at, &c. aforesaid.” [The other counts will vary accordingly.] And although the said *A B*, after the

11. For not marrying.
First count, to marry upon request.
(k)

* 90

(i) This day is not material. a man against a woman. Carth. 467.
(k) See the precedents in 2 1 Salk. 24. 5 Mod. 511. It is not necessary that the time of marriage should be specified. Carth. 467. A promise to marry is not within the statute of frauds, 3 Lev. 65. 1 Ld. Raym. 316. Bull. N. P. 280. It is necessary to shew mutual promises in the declaration. If the promise were to marry on a particular day, it should be so described in one count.

*XI. For not
marrying.*

* 91

making of the said promise and undertaking of the said *C D*, to wit, on, &c. at, &c. aforesaid, requested the said *C D* to marry her the said *A B*. Yet the said *C D* not regarding his said promise and undertaking, but contriving and fraudulently intending *craftily and subtly to deceive and injure the said *A B* in this respect, did not, nor would, at the said time when he was so requested as aforesaid, or at any time before or afterwards, marry her the said *A B*, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do.

Second count,
to marry in
a reasonable
time.

And whereas also heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said *A B* being then and there unmarried, at the like special instance and request of the said *C D*, had then and there undertaken, and faithfully promised the said *C D* to marry him the said *C D*, he the said *C D* undertook, and then and there faithfully promised the said *A B* to marry her the said *A B* in a reasonable time then next following. And the said *A B* avers, that she, confiding in the said last-mentioned promise and undertaking of the said *C D*, hath always hitherto remained and continued, and still is, *sole* and unmarried, and hath been, for and during all the time last aforesaid, and still is, ready and willing to marry the said *C D*, to wit, at, &c. aforesaid, and although a reasonable time for the said *C D* to marry her the said *A B*, hath elapsed since the making of the said last-mentioned promise and undertaking of the said *C D*. Yet the said *C D*, not regarding his said last-mentioned promise and undertaking, but contriving, &c. [as in the first count] did not, nor would, within such reasonable time as aforesaid, or at any time afterwards, marry her the said *A B*, but hath hitherto wholly neglected and refused so to do.

Third count,
to marry ge-
nerally.

* 92

And whereas also heretofore, to wit, on, &c. at, &c. aforesaid, in consideration that the said *A B* being then and there *sole* and unmarried, at the like special instance, &c. had then and there undertaken, and faithfully promised the said *C D* to marry him the said *C D*, he the said *C D* undertook, and then and there faithfully promised the said *A B* to marry her the said *A B*, and the said *A B* avers, that she, confiding in the said last-mentioned promise and undertaking of the said *C D*,

hath always from thence hitherto remained and continued, and still is, sole and unmarried, and hath been, for and during all the time last aforesaid, and still is, ready and willing to marry him the said *C D*, to wit, at, &c. aforesaid, and although a reasonable time for the said *C D* to marry the said *A B* hath elapsed since the making of the said last-mentioned promise and undertaking last aforesaid. And although the said *A B*, after the making of the said last-mentioned promise and undertaking of the said *C D*, to wit, on, &c. at, &c. aforesaid, requested the said *C D* to marry her the said *A B*. Yet the said *C D* not regarding his said last-mentioned promise and undertaking, but contriving, and fraudulently intending craftily and subtly to deceive and defraud the said *A B* in this respect, did not, nor would, at the said time when he was so requested, as last aforesaid, or at any time before or afterwards, marry the said *A B*, but on the contrary thereof, he the said *C D* at the said time when he was so requested as last aforesaid, wholly refused then or ever to marry her the said *A B*, to wit, at, &c. aforesaid. To the damage, &c.

XI. For not marrying.

For that whereas heretofore, to wit, on, &c. at, &c. in consideration that the said *A B* at the special, &c. had then and there agreed with the said *C D* to enter into the service of the said *C D* as a lady's maid, and would serve her the said *C D* in that capacity, at certain wages, after the rate of —*l.* a year, to be therefore paid by the said *C D* to the said *A B* during her continuance in such service, she the said *C D* undertook, and then and there *faithfully promised the said *A B* to receive her into the service of the said *C D* in the capacity aforesaid, and to retain and employ her in such service at the wages aforesaid. And the said *A B* avers, that she, confiding in the said promise and undertaking of the said *C D*, hath always been ready and willing to enter into the service of the said *C D*, in the capacity aforesaid, and to serve her the said *C D* in that capacity for the wages aforesaid. And although the said *A B*

12. For not receiving a hired servant into defendant's service.
(1)

* 93

(1) See precedents, 2 Wentw. 505 where the defendant has refused to employ the plaintiff, the declaration must be special, 2 East, 145; the declaration may be for work and labour generally, Fitz. 302. but Cowp. 437. 4 Esp. Rep. 77.

XII. For not
employing.

afterwards, to wit, on, &c. at, &c. aforesaid, requested the said *C D* to receive her the said *A B* into the service of her the said *C D* in the capacity aforesaid, and to retain and employ her in such service at the wages aforesaid. Yet the said *C D*, not regarding her said promise and undertaking, but contriving, and fraudulently intending craftily and subtly to deceive and defraud the said *A B* in this behalf, did not, nor would, at the said time when she was so requested as aforesaid, or at any time afterwards, receive the said *A B* into the service of her the said *C D*, or retain or employ her in such service at the wages aforesaid, or otherwise howsoever, but wholly neglected and refused so to do, whereby the said *A B* not only lost and was deprived of all the profits and emoluments which might and would otherwise have arisen and accrued to her from entering into the service of the said *C D*, but also lost and was deprived of the means and opportunity of being retained and employed by and in the service of divers other persons, and remained and continued wholly out of service and unemployed for a long space of time, to wit, for the space of three months then next following, and was and is otherwise greatly injured and damnified, to wit, at, &c. aforesaid, &c.

13. On a building agreement for not performing part of the work, and for performing the residue inartificially.
(m)

* 94

For that whereas, heretofore, to wit, on, &c. at, &c. by a certain agreement then and there made by and between the said *A B* and the said *C D*, it was agreed, that the said *C D* should take down a certain messuage or dwelling-house, situate at, &c. and should *build two other messuages or dwelling-houses for the said *A B*, agreeably to certain plans thereof then in the possession of the said *C D*, and according to the particulars and in manner following: that is to say, that the said old house should be taken down, and the bricks cleaned and worked up,

(m) The terms of the agreement are to be stated as in the agreement. The precedents which may be classed under this head are very numerous, see the Index to 2 Wentw. When the action is founded on a written agreement, it is usual to set the same out, as to which, see 6 East, 569. If

the declaration be framed as in the second count of the above precedent, it must either be shewn that the defendant was to have a reward for the work to be performed, or that he actually performed it, and unskillfully, 5 T. R. 143.

&c. [*Set out the agreement verbatim.*] And the said agreement being made afterwards, to wit, on, &c. at, &c. [*Mutual promises as ante, 76.*] And although the said *A B* hath always, &c. [*State plaintiff's general performance of the agreement, and special performance of any precedent condition.*]— Yet the said *A B* in fact saith, that the said *C D* contriving, and wrongfully, and unjustly intending, to injure the said *A B*, did not, nor would perform the said agreement, nor his said promise and undertaking, but thereby craftily and subtly deceived the said *A B*, in this, to wit, that the said *C D* wholly neglected and omitted to do and perform certain works which were requisite and necessary to be done and performed under and by virtue of the said agreement, and according to the tenor and effect, true intent and meaning thereof, that is to say, to pull down, &c. [*Here specify the breach, according to the fact.*] And the said *C D* also thereby craftily and subtly deceived the said *A B* in this, to wit, that the said *C D* afterwards, to wit, on, &c. and on divers other, &c. did and performed certain other works which were requisite and necessary to be done and performed under and by virtue of the said agreement, in a bad, inartificial, and unworkmanlike manner, contrary to the *form and effect of the said agreement, and of his said promise and undertaking, to wit, at, &c. aforesaid. And whereas also heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said *A B*, at the special, &c. of the said *C D*, had then and there retained and employed him the said *C D* to take down a certain other messuage or dwelling-house, with the appurtenances, and to erect and build divers, to wit, two other messuages or dwelling-houses, with the appurtenances in lieu thereof, for the said *A B*, agreeable to certain plans and particulars then and there made and agreed upon by and between the said *A B* and the said *C D*, for certain reasonable reward to the said *C D*, in that behalf, he the said *C D* undertook, and then and there faithfully promised the said *A B* to erect and build the said last-mentioned messuage or dwelling-house, with the appurtenances, agreeable to the said last-mentioned plans and particulars, with good and proper materials, and in a sound, substantial, and workmanlike manner, and although the said *C D* did afterwards and before the commencement of this suit, erect and build the said last-mentioned

XIII. For not performing works.

* 95

Second count on same contract.

XIII. For not performing works.

messuages or dwelling-houses, with the appurtenances, for the said *A B*, to wit, at, &c. aforesaid. Yet the said *C D*, not regarding &c. but contriving, &c. did not, nor would, erect or build the said last-mentioned messuages or dwelling-houses, with the appurtenances, for the said *A B*, *agreeable to the last-mentioned plans and particulars, with good and proper materials*, and in a sound, substantial and workmanlike manner, but wholly neglected and refused so to do, and on the contrary thereof, he the said *C D* erected and built the said last-mentioned messuages or dwelling-houses, with the appurtenances, *different from and contrary to the said last-mentioned plans and particulars, and with bad and improper materials*, and in a slight, weak, inartificial and unworkmanlike manner, contrary to the form and effect of his said last-mentioned promise and undertaking, to wit, at, &c. aforesaid. [Add another count similar to the last, omitting the words **in italics*, and such other counts as may be applicable to the case.]

* 96

14. Against an attorney for negligently conducting a cause to trial without proper evidence.
(n)

For that whereas heretofore, to wit, on, &c. at, &c. in consideration that the said *A B*, at the special instance and request of the said *C D*, had then and there retained and employed the said *C D* as an attorney of the court of our said lord the king, before the king himself, to prosecute and conduct a certain action of *trover* in the same court, by and at the suit of the said *A B* against one *E F*, for taking away and converting to his own use, certain goods and chattels, claimed by him the said *A B* to be his own proper goods and chattels, for certain reasonable fees and reward, to be therefore paid by the said *A B* to the said *C D*, he the said *C D* undertook, &c. to

(n) Declarations against auctioneers, agents, &c. of every description, may be framed on the same principle as this form. See precedents of declarations against attorneys, &c. for neglect, in the Index to vol. 2. of Wentw. The law implies a contract on the part of an attorney, and others employed for reward, to conduct the business of another, to perform their duty, in relation to their employment. As to the liability of an attorney, see

4 Burr. 2061. 2 Wils. 325. 1 Saund. 312. n. 2. and of others, and of the distinction, where there is no reward, 5 T. R. 143. 7 T. R. 171. 1 H. Bl. 158. Though usual it is not in general necessary nor advisable to allege that the party against whom the action was depending, was indebted, &c. but the declaration may be without any inducement, and may commence with the statement of the retainer. See Peake, C. N. P. 119.

prosecute and conduct the said action in a proper, skilful and diligent manner.^(o) Nevertheless the said *C D*, not regarding his said promise and undertaking, but contriving, &c. did not nor would prosecute or conduct the said action in a *proper, skilful, or diligent manner, but on the contrary thereof, prosecuted and conducted the same action to trial in so improper, unskilful, and negligent a manner, [in not having a certain instrument before then prepared by the said *C D*, and purporting to be a sale and assignment of the said goods and chattels, by the said *E F* to the said *A B*, stamped according to law, so that the same might have been given in evidence on the said trial of the said action,]^(p) that the said *A B* by the said neglect and default of the said *C D* in that behalf, was hindered and prevented from giving the same instrument in evidence upon the trial of the said cause, and by reason thereof, was afterwards, to wit, on, &c. at, &c. aforesaid, compelled to suffer himself the said *A B* to be nonsuited in the said action, whereby he the said *A B* was not only hindered and prevented from recovering his damages from the said *E F*, by reason of his taking away and converting the said goods and chattels as aforesaid, but hath also been forced and obliged to pay and hath paid to the said *E F* a large sum of money, to wit, the sum of —*l.* for his costs and charges in and about his defence of the said action; and hath also been forced and obliged to pay, and hath paid to the said *C D*, another large sum of money, to wit, the sum of —*l.* for his costs and charges, for the prosecution and conduct of the said action, to wit, at, &c. aforesaid. [*Add such other special counts as may be applicable to the case.*]

XIV. Against Attornies.

* 97

(o) It is in general proper, at least in one count, to declare generally on the duty of the agent, Rep. temp. Hardw. 309. In some cases it is advisable here to state the particular act, which it was the duty of the defendant to perform, and which allegation may be introduced in the following way: "and although it was the duty of the

said *C D*, under and by virtue of his said retainer, and his said promise and undertaking, to," &c. (stating the particular duty,) and then proceed, "Nevertheless," &c.

(p) The statement of the particular neglect of duty, must necessarily depend on the circumstances of each particular case.

15. For not
accepting
wheat.(?)
* 98

For that whereas heretofore, to wit, on, &c. at, &c. the said *C D* bargained for and bought of the said *A B*, and the said *A B* at the special instance and request of the said *C D*, then and there sold to the said *C D* a large quantity, to wit, ten loads of wheat, at the rate or price of —*l.* for each and every load thereof, to be delivered by the said *A B* to the said *C D* in a week then next following, at —, and to be paid for by the said *C D* to the said *A B* on the delivery thereof, as aforesaid, and in consideration thereof, and that the said *A B*, at the like special instance and request of the said *C D*, had then and there undertaken and faithfully promised the said *C D* to deliver the said wheat to him the said *C D* in the time and at the place aforesaid, he the said *C D* undertook, and then and there faithfully promised the said *A B*, to accept the said wheat of and from him the said *A B*, and to pay him for the same, on the delivery thereof to him the said *C D* as aforesaid. And although the said *A B* afterwards, and within a week next after the making of the said promise and undertaking of the said *C D*, to wit, on, &c. at, &c. aforesaid, was ready and willing, and then and there tendered and offered to deliver the said wheat to him the said *C D*, and then and there requested the said *C D* to accept the same, and to pay him for the same as aforesaid.(*r*) Yet the said *C D* not regarding his said promise and undertaking, but contriving, and craftily and subtly intending to deceive and defraud the said *A B* in this behalf, did not,

(*q*) See the precedents in Index to 2 Wentw. For not accepting stock, 4 East, 607. If there were a special written agreement between the parties, a count may be framed thereon, stating mutual promises. As the plaintiff may recover on the counts, for goods bargained and sold, although the goods have been resold, (see 4 Esp. Rep. 251. 1 East, 194. 1 Vesey, jun. 550. 7 T. R. 67.) this count is not absolutely necessary. It is usual, however, to declare specially, and this is necessary, in order to recover any special damage, by rehousing, &c. it is also necessary to declare specially, when the payment was to

be in bills of exchange, &c. See ante, 85. as to the count for goods bargained and sold, ante, 17.

(*r*) If by the terms of the contract, it were not incumbent on the vendor, to deliver at any particular place, but on the vendee to fetch the goods away from the plaintiff's premises, as is generally intended, when it is not otherwise agreed, (5 T. R. 409.) the contract should be stated accordingly, and the defendant's engagement to fetch away within a specified time, or a reasonable time, will be stated, and in such case it will be sufficient to aver the plaintiff's readiness to deliver.

nor would, at the said time, when he was so requested, as aforesaid, or at any time before or afterwards, *accept the said wheat, or any part thereof, of or from him the said *A B*, or pay him for the same, as aforesaid, but then and there wholly neglected and refused so to do. [If the article sold has been resold, as it may be, 1 Salk. 113. and a loss have arisen, or if there have been any expense in rehousing the goods, here state such damage. Add counts for goods bargained and sold, at wit, &c. and the account stated—and breach.]

IT. For not accepting goods

* 99

For that whereas heretofore, to wit, on, &c. at, &c. the said *A B*, at the special instance and request of the said *C D*, bargained with the said *C D* to buy of him the said *C D*, and the said *C D* then and there sold to the said *A B* a large quantity, to wit, ten loads of wheat at the rate or price of —*l*. for each and every load thereof, to be delivered by the said *C D* to the said *A B* in a week then next following, at —, and to be paid for by the said *A B* to the said *C D* on the delivery thereof as aforesaid; and in consideration thereof, and that the said *A B* at the like special, &c. had then and there undertaken and faithfully promised the said *C D* to accept and receive the said wheat, and to pay him for the same at the rate or price aforesaid; he the said *C D* undertook, &c. to deliver the said wheat to him the said *A B* as aforesaid; and although the said time for the delivery of the said wheat, as aforesaid, hath long since elapsed, and the said *A B* hath *always been ready and willing to accept and receive the said wheat, and to pay for the same at the rate or price aforesaid, to wit, at, &c. aforesaid;

16. For not delivering wheat within a specified time, and at a particular place(s)

* 100

(a) If there were a special written agreement, insert a count thereon, stating mutual promises. See a precedent, 1 East, 203, which, with the addition of an averment of notice of the plaintiff's readiness to pay, will be found useful. It is advisable in most cases in one count to set out the whole contract; in a second, to state the contract to be to deliver on request, averring a particular request;

and in a third count, to state the contract to be to deliver within a reasonable time, averring that a reasonable time has elapsed. In each count a readiness to pay the price must be alleged, 1 East, 203. 2 B. & P. 347. 2 Sim. 332. n. 3. When the contract is to deliver generally, or on request, a special request by the plaintiff must be averred, 5 T. R. 409.

XVI. *Not delivering goods.*

yet the said *C D* not regarding, &c. but contriving, &c. to deceive and defraud the said *A B* in this behalf, did not, nor would, within the time aforesaid, or at any time afterwards, deliver the said wheat, or any part thereof for the said *A B*, at, &c. aforesaid, or elsewhere, but wholly neglected and refused, so to do, whereby the said *A B* hath lost and been deprived of divers great gains and profits, which might and otherwise would have arisen and accrued to him from the delivery of the said wheat to him the said *A B* as aforesaid, to wit, at, &c. aforesaid. [*Add counts for money had and received—and on an account stated.*]

17. On a warranty of a horse to be sound. (t)
* 101

For that whereas heretofore, to wit, on, &c. at, &c. in consideration that the said *A B*, at the special instance and request of the said *C D*, would buy of him the said *C D*, a certain horse, at and for a certain price or sum of money, to wit, the sum of —*l.* to be therefore paid by him the said *A B*, he the said *C D* undertook, and then and there faithfully pro-

(t) As to actions for breaches of warranties in general, see 1 Vin. Abr. tit. Actions Case, Deceit, P. b. 1. Com. Dig. Action on the Case for a Deceit, A. 8. 2 East, 446. It was formerly more usual to declare in case than in assumpsit; but of late assumpsit is most usual, see 2 East, 451, 452. but if it be doubtful whether the defendant has a partner, it is advisable to declare in case, to avoid a plea in abatement, 3 East, 62. see the form, in case, *post*, and 3 Wils. 40. A warranty on the sale of a personal chattel as to the right thereto, is generally implied, 2 Bl. Com. 451. 3 Id. 160. 3 T. R. 57. Peake, C. N. P. 94. but not as to the right to real property, (Doug. 654. 2 B. & P. 13. 3 B. & P. 166.) if a regular conveyance has been executed, 6 T. R. 606. Nor is a warranty of soundness, goodness, or value of a horse or other personalty ever implied, 2 East, 314. 2 Bl. Com. 451. 3 Bl. Com. 165. 2 Roll. Rep. 5. F.

N. B. 94. *acc.* See 2 Wooddes. 415. 3 Id. 199. *cont.* It is not necessary for the purchaser to return the horse, &c. unless it be expressly stipulated that he should do so, 2 H. Bl. 572. 2 T. R. 745. If not so stipulated an action for the breach of warranty may be supported without returning the horse, or even giving notice of the unsoundness, and although the purchaser have resold the horse, 1 H. Bl. 17. 1 T. R. 136. 2 F. R. 745. But unless the horse, &c. be returned as soon as the defect is discovered, or if the horse has been long worked, the purchaser cannot recover back the purchase-money on the count for money had and received, 1 T. R. 136. 5 East, 449. 7 East, 274. 1 New Rep. 260. and in these cases, or when the purchaser has doctored the horse, he has no defence to an action by the vendor for the price, but must proceed in a cross action on the warranty. Id. *ibid.* 3 Esp. Rep. 82. 4 Esp. Rep. 95.

promised the said *A B* that the said horse then was sound;^(u) and the said *A B* avers, that he, confiding in the said promise and undertaking of the said *C D*, did afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, buy the said horse of the said *C D* and then and there paid him for the same the said sum of —*l*. nevertheless, the said *C D*, contriving and fraudulently intending to injure the said *A B*, did not perform or regard his said promise and undertaking, so by him made as aforesaid, but thereby craftily and subtly deceived and defrauded the said *A B* in this, to wit, that the said horse, at the time of the making of the said promise and undertaking of the said *C D*, was not sound, but on the contrary thereof, was at that time unsound,^(x) whereby the said horse became and was of no use or value to the said *A B*; and he the said *A B* hath been put to great charges and expense of his monies in and about the feeding, keeping and taking care of the said horse, in the whole amounting to a large sum of money, to wit, the sum of —*l*. to wit, at, &c. aforesaid.

XVII. On Warranties.

And whereas also afterwards, to wit, on, &c. aforesaid, at &c. aforesaid, in consideration that the said *A B*, at the like special instance and request of the said *C D*, had then and there bought of him the said *C D*, a certain other horse, at and for a certain other price or sum of money then *and there agreed upon between him the said *A B* and the said *C D*, he the said *C D* undertook, and then and there faithfully promised the said *A B* that the said last-mentioned horse, at the time of the said sale thereof, was sound; nevertheless, the said *C D*, contriving, &c. (*as in the first count*,) in this, to wit, that the said last-mentioned horse, at the time of the said sale thereof, was not sound, whereby the same horse then and there became, &c. [*As in the first count, and add counts for horse-keep, if there were any contract to that effect—and the money counts.*]

* 102

(u) This form may readily be applied to any description of warranty, as that the horse was "free from vice," &c. being a rule in pleading, that the breach may in general be assigned in the negative of the words of the contract, Com. Dig. Pleader, C. 45. 2

(x) The particular description of unsoundness needs not be stated, it Saund. 181. b. 3. T. R. 807.

18. On a warranty of soundness on the exchange of horses.

For that whereas heretofore, to wit, on, &c. at, &c. in consideration that the said *A B*, at the special instance, &c. would deliver to the said *C D* a certain horse of him the said *A B*, of great value, and would also pay to him the said *C D* a certain sum of money, to wit, the sum of —*l.* of lawful, &c. in exchange for a certain mare of him the said *C D*, he the said *C D* undertook, &c. that the said mare of him the said *C D*, was then and there sound; and the said *A B* avers that he, confiding in the said promise and undertaking of the said *C D*, did afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, deliver to the said *C D*, the said horse of him the said *A B*, and did also then and there pay to him the said *C D* the said sum of —*l.* in exchange for the said mare, of him the said *C D*. Yet the said *C D*, contriving and fraudulently intending to injure the said *A B*, did not perform or regard his said promise and undertaking; but thereby craftily and subtly deceived the said *A B* in this, to wit, that the said mare, at the time of the making of the said promise and undertaking of the said *C D* as aforesaid, was not sound, but on the contrary thereof, was at that time unsound, whereby the said mare became and was of no use or value to the said *A B*, to wit, at, &c. aforesaid; and whereby also, (*state special damage by expense of feeding,*

Second count.

* 103

Ec. as ante, 101.) And whereas also afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said *A B*, at the *like special, &c. had then and there delivered to the said *C D* a certain other horse of him the said *A B*, of great value, and had also paid to him the said *C D*, a certain other sum of money, to wit, &c. in exchange for a certain other mare of him the said *C D*, he the said *C D* then and there undertook, &c. that the said last-mentioned mare, at the time of such last-mentioned exchange, was sound; yet the said *C D* contriving, &c. did not perform or regard his said last-mentioned promise and undertaking; but thereby craftily and subtly deceived the said *A B* in this, to wit, that the said last-mentioned mare, at the time of the said last-mentioned exchange, was not sound, but was at that time unsound, and thereby became and was of no use or value to the said *A B*, to wit, at, &c. aforesaid. [*As to the statement of the damage and the common counts, ante*, 101.]

AGAINST BAILEES.

In *Coggs v. Bernard*, 2 Lord Raym. 912, 913. Holt, Ch. J. General observations. states that there are six sorts of bailments; but Sir William Jones, in his *Work on Bailments*, 35, 36. arranges them under five heads: 1. *Depositum*, or the delivery of goods to the bailee to be kept for the bailor without reward. 2. *Mandatum*, or commission when the bailee undertakes without reward to do some act about the thing bailed, or to carry it. 3. *Commodatum*, or loan for bailee's use without reward to bailor. 4. *Pignori acceptum*, where goods are pawned to bailee. 5. *Locatum*, or hiring, which is always for reward; and which is either, 1st. *Locatio rei*, or use of the thing by bailee paying reward to the bailor. 2dly. *Locatio operis faciendi*, when work and labour, or care and pains are to be performed or bestowed on the thing delivered. 3dly. *Locatio operis mercium vehendarum*, when goods are delivered to a public carrier, or a private person to be carried. The respective liabilities of these several bailees are considered in the authorities above referred to, and in 1 H. Bl. 158. 1 Saund. 312. n. 2. In the following pages a *precedent is given under each of the heads that usually occur in practice, except that of *Mandatum*, as to which see a declaration, 1 H. Bl. 158. 5 T. R. 143.

* 104

For that whereas heretofore, to wit, on, &c. at, &c. in consideration that the said A B, at the special, &c. had caused to be delivered to him the said C D certain goods and chattels, to wit, &c. of great value, to wit, of the value of —£. to be taken care of, and safely and securely kept by the said C D for the said A B, he the said C D undertook, &c. to take due and proper care of, and safely and securely keep the said goods and chattels for the said A B, and to redeliver the same to him the said A B,

Depositum, ante, 103.
19. Against bailee without reward for not taking care of, and redelivering goods entrusted to his care. (y)

(y) This description of bailment is not liable for loss or damage, unless it be attributable to a degree of neglect, of which a prudent man would not be guilty in the care of his own property. *Id. Ibid.*
35, 36. 2 Stra. 1099. and the bailee

*XIX. Against
Bailees.*

when he the said *C D* should be thereunto afterwards requested; and although the said *C D* then and there had and received the said goods and chattels of and from the said *A B* for the purpose aforesaid; and although the said *C D* was afterwards, to wit, on, &c. at, &c. aforesaid, requested by the said *A B* to redeliver the said goods and chattels to him the said *A B*; yet the said *C D*, not regarding his said promise and undertaking, but contriving, &c. did not, nor would, take due and proper care of, and safely or securely keep the said goods and chattels, or any part thereof, for the said *A B*, nor did, nor would, at the said time when he was so requested as aforesaid, or at any time afterwards, redeliver the same to the said *A B*, but on the contrary thereof, he the said *C D* so negligently and carelessly conducted himself, with respect to the said goods and chattels, and took so little care thereof, that by and through the mere carelessness, negligence and improper conduct of the said *C D* and his servants in that behalf, *the said goods and chattels being of the value aforesaid, became and were wholly lost to the said *A B*, to wit, at, &c. aforesaid. [*Add a count on defendant's implied undertaking to redeliver on request, omitting the statement of the want of care. If the defendant has been guilty of a conversion, or it be doubtful whether others also may be liable, it may be advisable to declare in case, adding a count in trover. 3 East, 62. 70.*]

* 105

Commodatum,
ante, 103.
20. For not
returning
casks, or pay-
ing for them.
(=)

For that whereas heretofore, to wit, on, &c. at, &c. in consideration that the said *A B*, at the special, &c. would from time to time sell and deliver to him the said *C D* ale, and would send and deliver the same to him the said *C D*, in hogsheads and casks of the said *A B*, he the said *C D* undertook, &c. to return the said hogsheads and casks to him the said *A B* at the expiration of a reasonable time to be allowed for emptying the same, or to pay him for the said hogsheads and casks at the rate and price of 1*l.* for each of the said hogsheads and casks. And the said *A B* avers, that he, confiding, &c. did afterwards, to wit, on, &c. aforesaid, and on divers other days and times between that day and the commencement of this suit, sell

and deliver divers large quantities, to wit, — hogsheads and — casks of ale, to the said *C D*, and did then and there send and deliver the same to him the said *C D* in divers, to wit, — hogsheads and — casks, of him the said *A B*, of great value, to wit, of the value of —*l.* and although a reasonable time for emptying the said hogsheads and casks, and returning the same to the said *A B* hath long since elapsed. Yet the said *C D*, not regarding, &c. but contriving, &c. did not, nor would, at the expiration of such reasonable time as aforesaid, or at any time before or since, although often requested so to do, return the said hogsheads and casks, or any of them, to the said *A B*, nor did, nor would, pay the said *A B* for the same, or any of them, at the rates and prices aforesaid. But to *return the said hogsheads and casks, or any of them to the said *A B*, or pay for the same as aforesaid, he the said *C D* hath hitherto wholly neglected and refused, and still neglects and refuses so to do. to wit, at, &c. aforesaid. [*Second count for not returning the casks, omitting what relates to the payment of money, and add one count for casks, goods, &c. sold and delivered—money had and received—and the account stated.*]

XX. For not returning casks.

* 106

For that whereas before and at the time of the making of the promise and undertaking of the said *C D* hereinafter next mentioned, the said *C D* was a pawnbroker, to wit, at, &c. And thereupon heretofore, to wit, on, &c. at, &c. aforesaid, in consideration that the said *A B*, at the special instance and request of the said *C D*, had then and there pawned and delivered to him the said *C D*, certain goods and chattels, to wit, &c. of him the said *A B*, of great value, to wit, of the value of —*l.* as and by way of pledge to him the said *C D*, for a certain sum of money, to wit, the sum of —*l.* then and there advanced by him the said *C D* to the said *A B*, thereon, he the said *C D* undertook, &c. to take due and proper care of the said last-mentioned goods and chattels, until the same should be redeemed by the said *A B*, and redelivered by the said *C D* to the said *A B*. And although the said *C D* then and there had and received the said goods and chattels for the purpose, and on the terms aforesaid. Yet the said *C D*, not regarding, &c. but contriving, &c. did not take due and proper care of the said goods and chattels until the same were redeemed by the said *A B*, and redelivered by the said

*Pignori, ante, 103.
21. Against a pawnbroker for losing a pledge.*

XXI. Against Pawnbrokers.

* 107

C D to the said *A B*, but on the contrary thereof, he the said *C D* afterwards, and whilst he so had the custody of the said goods and chattels as aforesaid, to wit, on, &c. at, &c. aforesaid, took so little care of, and so negligently kept the said goods and chattels, that the same, while they were in the possession of the said *C D*, for the purpose aforesaid, by and through the mere carelessness and negligence of the said *C D* in that behalf, became *and were wholly lost to the said *A B*, (or greatly damaged and spoiled,) to wit, at, &c. aforesaid. [Add a count as for a depositum, ante, 103. and Lord Raym. 912.]

Locatio rei, ante, 103.

22. Against the hirer of a horse for riding it improperly, and a different journey from that for which it was hired.

For that whereas heretofore, to wit, on, &c. at, &c. in consideration that the said *A B*, at the special, &c. of the said *C D* would let to hire and deliver to him the said *C D*, a certain horse(a) of him the said *A B*, of great value, to wit, of the value of ——. for him the said *C D*, to go and perform a certain journey therewith, to wit, from, &c. to, &c. and from thence back again to, &c. aforesaid, for certain reasonable reward to the said *A B* in that behalf, he the said *C D* undertook, &c. that he the said *C D* would not go or perform another or different journey with the said horse than the said journey from, &c. to, &c. aforesaid, and from thence back again to, &c. aforesaid, and that he would ride and use the said horse in a moderate, careful, and proper manner. And the said *A B* avers, that he, confiding, &c. did, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, let to hire, and deliver the said horse to the said *C D*, and the said *C D* then and there hired and received the same of and from the said *A B*, for the purpose and upon the terms aforesaid. Yet the said *C D*, not regarding, &c. but contriving, &c. afterwards, to wit, on, &c. aforesaid, went and performed with the said horse another and different journey than the said journey from, &c. aforesaid, to, &c. aforesaid, and from thence back again to, &c. aforesaid, that is to say, a certain journey from, &c. aforesaid, to, &c. aforesaid and thence to a certain place called —, in the county of —, and thence back again to — aforesaid, and in going and performing the said last-mentioned journey as

(a) This is usual, though to avoid insert the words, "and bridle and any doubt, it may perhaps be advisable, when applicable to the facts, to saddle."

aforesaid, he the said *C D* so immoderately, violently, carelessly, and improperly rode and used the said horse, that by means of the several premises aforesaid, the said horse became and was greatly lamed and hurt, and so remained and continued for a long space of time, to wit, &c. hitherto and during all which time he the said *A B* lost and was deprived of the use and benefit of his said horse, and also thereby the said horse then and there became and was greatly damaged, lessened in value, and spoiled, to wit, at, &c. aforesaid. *[The second count is usually for riding the horse immoderately, and is as follows:]* And *Against Bail-ees.*

108

whereas also heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said *A B*, at the like, &c. had let to hire and delivered to him the said *C D*, a certain other horse of him the said *A B* of great value, to wit, of the value of —, to be ridden and used by the said *C D*, he the said *C D* undertook, and then and there faithfully promised the said *A B* to ride and use the said last-mentioned horse in a moderate, careful and proper manner. And although the said *C D* then and there had and received the said last-mentioned horse of and from the said *A B*, for the purpose last aforesaid. Yet the said *C D*, not regarding his said last-mentioned promise and undertaking, but contriving, &c. did not, nor would, ride or use the said last-mentioned horse in a moderate, careful or proper manner, but wholly neglected and refused so to do. And on the contrary thereof, he the said *C D*, after the making of his said last-mentioned promise and undertaking, to wit, on, &c. aforesaid, at, &c. aforesaid, so carelessly and improperly rode and used the said last-mentioned horse, that by means thereof, the said last-mentioned horse became and was greatly lamed and hurt, and so remained and continued for a long space of time, to wit, hitherto, during all which time he the said *A B* thereby lost and was deprived of the use and benefit of the said last-mentioned horse, and also thereby the said last-mentioned horse being of the value aforesaid, became and was greatly damaged, lessened in value, and spoiled, to wit, at, &c. aforesaid. *[If there be any doubt whether the injury were occasioned by improper riding, it is advisable to add a count nearly similar to the last, but stating the defendant's promise to have been, "that whilst he should so have the use of the said last-mentioned*

* 109

*Against Bail-
ees.* *

horse as aforesaid, he would take due and proper care thereof," and averring, "that the defendant had the use, &c. and that whilst he so had the use, &c. he did not take due and proper care thereof, but wholly neglected so to do. And by reason thereof the said last-mentioned horse, on, &c. became and was greatly damaged, to wit, at, &c. aforesaid." [*It may also be advisable to add another count, stating "that whereas heretofore, to wit, on, &c. at, &c. in consideration that the plaintiff, at the special, &c. had delivered to the defendant a certain other horse, &c. to be had and used by the defendant, (omitting the statement for hire,) defendant undertook," &c. stating the promise, as in the count last suggested. If there be any demand for horse-hire, add the common counts, ut ante, 21. and the account stated—and breach.]*

*Locatio rei,
ante, 103.
23 For not
taking care of
household fur-
niture let to
hire to defen-
dant.*

That whereas heretofore, to wit, on, &c. at, &c. in consideration that the said *A B* at the special, &c. had let to hire and delivered to the said *C D* certain household-furniture, goods and chattels, to wit, &c. of the said *A B* of great value, to wit, &c. to be had and used by the said *C D* for a certain time in that behalf agreed upon by and between the said *A B* and the said *C D*, to wit, &c. he the said *C D* undertook, &c. to take due and proper care of the said household-furniture, goods and chattels, and to redeliver the same to the said *A B* at the expiration of the time for which the same were so let to hire as aforesaid, and although the said *C D* then and there had and received the said household-furniture, goods and chattels, of and from the said *A B* for the purpose aforesaid, and although the time for which the same were so let to hire as aforesaid, hath long since elapsed. Yet the said *C D* not regarding, &c. but contriving, &c. did not, nor would, take due and proper care of the said household-furniture, goods and chattels, or at the expiration of the time for *which the same were so let to hire as aforesaid, or at any time afterwards, redeliver the same or any part thereof to the said *A B*, (although he was afterwards, to wit, on, &c. at, &c. aforesaid, requested by the said *A B* so to do,) but on the contrary thereof he the said *C D* took so little care of the said household-furniture, goods and chattels, that by and through the mere negligence and carelessness of the said *C D* in this behalf, a great part of the said household-furniture, goods and chattels, to wit, &c. [here spe-

* 110

ify them] of the said *A B* of great value, to wit, &c. became and were wholly lost to him the said *A B*, to wit, at, &c. aforesaid. [The second, or other special counts in a case of this nature frequently vary; it may be advisable in general to add a count stating a delivery to the defendant to be used generally and not stating that he had the use of them for any particular purpose or time, and confining the promise and breach merely to the care of the goods. If there be any demand for the use of the furniture, add the common counts, *ut ante*, 21. and the account stated—and breach.]

*Against Bail-
ees.*

For that whereas the said *C D*, before and at the time of the making of his promise and undertaking hereinafter next mentioned, was a watchmaker, and the trade and business of a watchmaker then followed and carried on, to wit, at, &c. And thereupon heretofore, to wit, on, &c. at, &c. aforesaid, in consideration that the said *A B*, at the special, &c. of the said *C D*, had then and there delivered to him the said *C D* a certain watch of him the said *A B* of great value, to wit, of the value of —*l.* of lawful, &c. to be repaired by him the said *C D* in the way of his said trade or business of a watchmaker, for reasonable reward, to be therefore paid by the said *A B* to the said *C D*, he the said *C D* undertook, &c. to repair the said watch, and to take due and proper care thereof, until the same should be returned by the said *C D* to the said *A B*. Yet the said *C D* not regarding, &c. but contriving, &c. did not, nor would, take due and *proper care of the said watch, until the same was returned by him the said *C D* to the said *A B*, but on the contrary thereof, he the said *C D* after the making his said promise and undertaking, to wit, on, &c. aforesaid, at, &c. aforesaid, so carelessly and negligently behaved and conducted himself with respect to the said watch, that by and through the mere carelessness, negligence, and improper conduct of the said *C D* in that behalf, the said watch being of the value aforesaid, became, and was, and still is, wholly lost to the said *A B*, to wit, at, &c. aforesaid. And whereas also afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said *A B*, at the special, &c. of the said *C D*, had then and there delivered to the said *C D* a certain other watch, of great value, to wit, &c. to be rectified by him the said *C D* for certain reward, to

*Locatio operis
faciendi,
ante, 103.
24. Against
a watchmaker
for losing a
watch delivered
to him to
repair.*

* 111

Second count,
for not rede-
livering the
watch.

*Against Bail-
ees.*

be therefore paid to him, he the said *C D* undertook, &c. to endeavour to rectify the said last-mentioned watch within a reasonable time then next following, and to deliver the same to the said *A B*, whenever after such reasonable time had elapsed he the said *C D* should be thereunto requested: And although the said *C D* then and there had received the said last-mentioned watch for the purpose last aforesaid. Yet he, not regarding his said last-mentioned promise and undertaking, hath not, although a reasonable time for rectifying the said last-mentioned watch hath long since elapsed, and the said *C D* was, after such reasonable time had elapsed, to wit, on, &c. aforesaid, at, &c. aforesaid, requested by the said *A B* so to do, as yet delivered to him the said *A B* the said last-mentioned watch, but hath hitherto wholly neglected and refused so to do, to wit, at, &c. aforesaid. [*Add count for money had and received. If there be reason to apprehend that the defendant has been guilty of a conversion, it may be advisable to declare in case, with a count in trover, 3 East, 62. 70.*]

25. Against
a wharfinger,
for losing a
hamper deliv-
ered to him
to be shipped
by a particu-
lar vessel. (b)

* 112

For that whereas the said *C D*, before and at the time of the making of his promise and undertaking hereinafter next * mentioned, was a wharfinger, and the business of a wharfinger used, exercised and carried on, at and upon a certain wharf, commonly called or known by the name of —, situate and being near to and adjoining the river *Thames*, in the city of *London*, to wit, at, &c. and thereupon heretofore, to wit, on, &c. at, &c. aforesaid, in consideration that the said *A B* at the special, &c. of the said *C D*, had caused to be delivered to the said *C D* at and upon the said wharf, a certain hamper, containing certain goods and chattels, to wit, &c. of the said *A B* of great value, to wit, of the value of —*l.* &c. to be by him, the said *C D*, safely and securely kept at and upon the said wharf, and from thence shipped in and on board of a certain ship or vessel, for the purpose of being carried and conveyed therein from the river *Thames* aforesaid, to a certain

(b) A wharfinger is not, like a guilty of negligence. See 4 T. R. carrier, responsible at all events for 581. Peake's N. P. 114. See pre- the safe custody of goods entrusted to cedents, 2 Wentw. Index. 7 T. R. his care—he is liable only when he is 171. 3 Wentw. 21.

place called, &c. for reasonable wharfrage and reward to the said *C D* in that behalf, he the said *C D* undertook, &c. that he the said *C D* would safely and securely keep the said hamper and its contents aforesaid, at and upon the said wharf, and would ship the same in and on board of the said ship or vessel in manner and for the purpose aforesaid, and although the said *C D* then and there had and received the said hamper and its contents aforesaid, and could, and might, and ought to have shipped the same in and on board of the said ship or vessel, in manner and for the purpose aforesaid; yet the said *C D* not regarding, &c. but contriving, &c. in this behalf, did not, nor would, safely and securely keep the said hamper and its contents aforesaid, at and upon the said wharf, nor ship the same in and on board of the said ship or vessel, in manner and for the purpose aforesaid, but on the contrary thereof he the said *C D* so carelessly and negligently conducted himself in this behalf, that by and through the mere carelessness and negligence of the said *C D* and his servants in that behalf the said hamper and its contents aforesaid, being of the value aforesaid, became and were wholly lost to the said *A B*, to wit, at, &c. aforesaid. And whereas also heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said *A B* at the like special, &c. had caused to be delivered to the said *C D* certain other, &c. of the said *A B* of great value, to wit, &c. to be by him the said *C D*, safely and securely kept and taken care of, and shipped within a reasonable time then next following, in and on board of some ship or vessel, about to sail and proceed from the river *Thames* aforesaid, to, &c. aforesaid, for certain reasonable reward to the said *C D* in that behalf, he the said *C D* undertook, &c. safely and securely to keep the said last-mentioned, &c. till the same should be so shipped as last aforesaid, and to ship the same within a reasonable time then next following in and on board of some ship or vessel about to sail from, &c. aforesaid, to, &c. aforesaid; and although the said *C D* then and there had and received the said last-mentioned, &c. for the purpose last aforesaid, and although a reasonable time for the said *C D* to ship the said last-mentioned, &c. hath long since elapsed, and although the said *C D* could and might during that time, have shipped the said last-mentioned, &c. as last aforesaid, yet the said *C D* not regard-

*Against Bail-
ees.*

* 113

Second count,
for not ship-
ping the ham-
per on board
any vessel in
a reasonable
time.

*Against Bail-
ees.*

ing, &c. but contriving, &c. did not, nor would, within such reasonable time as aforesaid, or at any time since, ship the said last mentioned, &c. in and on board of any ship or vessel about to sail from, &c. aforesaid, to, &c. aforesaid, but wholly neglected so to do, and the said *C D* so carelessly and negligently conducted himself in that behalf, that by and through the mere carelessness and negligence of the said *C D*, the said last-mentioned, &c. being of the value aforesaid, became and were wholly lost to the said *A B*, to wit, at, &c. aforesaid.

*** 114**

Third count,
for not keep-
ing safely till
the hamper
was shipped.

*And whereas also the said *C D* heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said *A B* at the special, &c. of the said *C D*, had caused to be delivered to him the said *C D* a certain other hamper, containing certain other, &c. to wit, &c. of the said *A B* of great value, to wit, of the value, &c.† and which said last-mentioned hamper, and its contents aforesaid, were then and there intended to be shipped, for and on account of the said *A B*, to be by him the said *C D* safely and securely kept at and upon the said wharf until the same should be so shipped as aforesaid, for a reasonable wharfage and reward, to and for the said *C D*, he the said *C D* undertook, &c. the said *A B*, that he the said *C D* would safely and securely keep the said last-mentioned hamper and its contents aforesaid, at and upon the said wharf, until the same should be so shipped as last aforesaid. And although the said *C D* had and received the said last-mentioned hamper and its contents aforesaid, for the purpose last aforesaid. Yet the said *C D* not regarding, &c. but contriving, &c. in this behalf, did not, nor would, safely or securely keep the said last-mentioned hamper and its contents aforesaid, at or upon the said wharf, until the same was so shipped, as last aforesaid, but on the contrary thereof, he the said *C D* so carelessly and negligently conducted himself in this behalf, that by and through the mere carelessness and negligence of the said *C D* and his servants, the said last-mentioned hamper and its contents aforesaid, being of the value aforesaid, were afterwards and before the same were so shipped, as last aforesaid, wholly lost to the said *A B*, to wit, at, &c. aforesaid.

And whereas, also, &c. [*same as third count as far as the obediak, and then proceed as follows:*] to be by him the said *C D* safely and securely kept for the said *A B*, he the said *C D* undertook, &c. the said *A B*, that he the said *C D* would safely and securely keep the said last-mentioned hamper and its contents aforesaid, for the said *A B* as aforesaid.† And although the said *C D* then and *there had and received the said last-mentioned hamper and its contents aforesaid, for the purpose last aforesaid. Yet the said *C D* not regarding, &c. but contriving, &c. in this behalf, did not, nor would, safely and securely keep the said last-mentioned hamper and its contents aforesaid, but on the contrary thereof, he the said *C D* so carelessly and negligently conducted himself in that behalf, that by and through the mere carelessness and negligence of the said *C D* the said last-mentioned hamper and its contents aforesaid, being of the value aforesaid, became, and were wholly lost to the said *A B* to wit, at, &c. aforesaid.

Against Bail-ees.

Fourth count, for not safely keeping the hamper generally.

* 115

And whereas also heretofore, to wit, on, &c. aforesaid, at, &c. [*same as last count, as far as† and then proceed as follows:*] and to redeliver the same to her the said *A B* when he the said *C D* should be thereto afterwards requested. And although the said *C D* was afterwards, to wit, on, &c. requested by the said *A B* to redeliver the said last-mentioned hamper and its contents aforesaid, to him the said *A B*, to wit, at, &c. aforesaid. Yet the said *C D* not regarding, &c. did not, nor would, at the said time, when he was so requested as aforesaid, or at any time afterwards, redeliver the said last-mentioned hamper and its contents aforesaid, or any part thereof, to the said *A B*, but he so to do, hath hitherto wholly neglected and refused, and still doth neglect and refuse, to wit, at, &c. aforesaid.— [*Add counts for money had and received, and the account stated, if there be any reason to apprehend that the defendant may have received the value of the goods.*]

Fifth count, on a promise safely to keep the hamper and redeliver it on request.

For that whereas the said *A B* heretofore, to wit, on, &c. at, &c. at the special, &c. retained and employed him *the said

26. Against a farrier for badly shoeing plaintiff's horse. (c)

* 116

(c) This action is founded on the perform it properly, 1 Saund 312. n implied contract, that every work- 2. 1 H. Bl. 158. 7 T. R. 171. 5 T man, &c. undertaking any work, will R. 150.

*Against Bail-
ees.*

C D, (he the said *C D* then and there being a farrier,) in the way of his said business of a farrier, to shoe a certain horse of the said *A B*, of great value, and in consideration thereof, and also in consideration of certain reasonable reward, to the said *C D* in that behalf, he the said *C D* then and there, to wit, on, &c. aforesaid, at, &c. aforesaid, undertook, &c. the said *A B* to shoe the said horse in a skilful, careful, and proper manner, and although the said *C D* then and there had and received the said horse for the purpose aforesaid, and shod the same. Yet the said *C D* not regarding, &c. but contriving, &c. in this behalf, did not, nor would, shoe the said horse in a skilful, careful and proper manner, but wholly neglected so to do, and on the contrary thereof, he the said *C D* after the making of his said promise and undertaking, to wit, on, &c. aforesaid, at, &c. aforesaid, so unskilfully, carelessly, negligently and improperly shod the said horse, that by and through the mere unskilfulness, carelessness and improper conduct of the said *C D* in this behalf, the near-foot before, of the said horse, was then and there pricked and wounded. And the said *C D* then and there put and placed too narrow a shoe on the said horse, and thereby, and otherwise so improperly shod the said horse that by means of the said several premises, the said horse then and there became, and was lamed and hurt, and so remained and continued for a long space of time, to wit, from thence, hitherto, during all which time the said *A B* thereby lost and was deprived of the use and benefit of his said horse, and also thereby, he the said *A B* was forced and obliged to, and did necessarily lay out and expend a large sum of money, to wit, &c. in and about the endeavouring to heal and cure the said horse, and the said horse was, and is by means of the said premises greatly damaged and deteriorated in value, to wit, at, &c. aforesaid. [*Add one or more special counts, less particular and adapted to the nature of the case.*]

* 117

*27. Against a
carrier by
land, for the
loss of a box.
(a)*

*For that whereas the said *C D*, before and at the time of the making of his promise and undertaking hereinafter next men-

(d) The action should be brought risk, as is most usual, and not in the name of the consignee of the name of the consignor, 8 T. R. 330. goods, when they are sent at his Bull. N. P. 36. 3 P. Wms. 186. 3

tioned, was a common carrier of goods and merchandise for hire, in and by a certain waggon, (or "coach,") from ——— to ———, (c) to wit, at, &c. And the said *C D* being such carrier as aforesaid, the said *A B* heretofore, to wit, on, &c. at, &c. aforesaid, at the special instance and request of the said *C D*, caused to be delivered to him the said *C D*, being such carrier as aforesaid, at, &c. aforesaid, a certain box containing certain goods and chattels, to wit, &c. (*describe them*), of the said *A B*, of great value, to wit, of the value of ——. of lawful, &c. to be taken care of, and safely and securely carried and conveyed by the said *C D*, as such carrier as aforesaid, in and by the said waggon, (or "coach,") from, &c. aforesaid, to, &c. aforesaid, and there, to wit, at &c. aforesaid, to be safely and securely delivered by the said *C D* for the said *A B*; and in consideration thereof, and of certain reward to him, the said *C D*, in that behalf, he the said *C D* being such carrier as aforesaid, then and there, to wit, on, &c. aforesaid, at, &c. aforesaid, undertook, and faithfully promised the said *A B* to take care of *the said box and its contents aforesaid, and safely and securely to carry and convey the same in and by the said waggon, (or "coach,") from, &c. aforesaid, to, &c. aforesaid, and there, to wit, at, &c. aforesaid, safely and securely to deliver the same for the said *A B*; and although the said *C D* as such carrier as aforesaid, then and there had and received the said box and its contents aforesaid, for the purpose aforesaid, yet the said *C D*, not regarding his duty as such carrier, nor his

* 118.

B. & P. 582. 2 Saund. 47. h. Cowp. 295. 3 T. R. 469. See the modern decisions as to the liability of carriers, and the form of declaring, Selwyn's N. P. tit. Carrier. 4 East, 371. 5 East, 428. 512. 6 East, 564. According to the last case, the declaration may be in the usual form, though under the usual advertisement the carrier may be liable only to the amount of 5*l*. The declaration may be either in *assumpsit* or case, 5 Mod. 92. 2 Salk. 440. The latter form of action is preferable if there be any doubt as to the defend-

ant's having a partner, because in an action on the case the joinder of too many defendants will not prejudice, nor can the defendant plead in abatement the nonjoinder of his copartners, 3 East, 62.

(c) It does not appear to be necessary to commence with an inducement of the defendant's being a common carrier, or of the nature of the conveyance, but the declaration will suffice if it merely state the delivery to the defendant of the goods, &c. to be carried from, &c. to, &c. and his undertaking to carry accordingly.

*Against Bail-
ers.*

said promise and undertaking so made as aforesaid, but contriving and fraudulently intending craftily and subtly to deceive and injure the said *A B* in this behalf, hath not taken care of the said box, and its contents aforesaid, or safely or securely carried or conveyed the same from, &c. aforesaid, to, &c. aforesaid, nor hath there, to wit, at, &c. aforesaid, safely or securely delivered the same for the said *A B*, but on the contrary thereof, he the said *C D*, being such carrier as aforesaid, so carelessly and negligently behaved and conducted himself with respect to the said box and its contents aforesaid, that by and through the mere carelessness, negligence and improper conduct of the said *C D* and his servants in this behalf, the said box and its contents aforesaid, being of the value aforesaid, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, became and were wholly lost to the said *A B*, to wit, at, &c. aforesaid.

Second count,
for not carrying
within a
reasonable
time.

And whereas also afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said *A B*, at the special instance and request of the said *C D*, had then and there caused to be delivered to him the said *C D*, divers other goods and chattels, to wit, &c. of great value, to wit, of, &c. to be taken care of, and safely and securely carried and conveyed by the said *C D* from, &c. aforesaid, to, &c. aforesaid, and there, to wit, at, &c. aforesaid, to be delivered by the said *C D* for the said *A B*, for certain reward to the said *C D*, in that behalf, he the said *C D* undertook, &c. to take care of the said last-mentioned goods and chattels, and safely and securely to carry and convey the same from, &c. aforesaid, to, &c. aforesaid, and there, to wit, at, &c. aforesaid, to deliver the

* 119

same for the said *A B* in a reasonable time then next following. And although the said *C D* then and there had and received the said last-mentioned goods and chattels for the purpose aforesaid, and although a reasonable time for the carriage, conveyance and delivery thereof as aforesaid, hath long since elapsed, yet the said *C D*, not regarding, &c. but contriving, &c. did not, nor would, within such reasonable time as aforesaid, or at any time afterwards, although often requested so to do, safely and securely carry and convey the said last-mentioned goods and chattels from, &c. aforesaid, to, &c. aforesaid, nor there, to wit, at, &c. aforesaid, deliver the same for the said *A B*, but hath hitherto wholly neglected and refused

to do, whereby the said last-mentioned goods and chattels being of the value aforesaid, have been, and are wholly lost to the said *A B*, to wit, at, &c. aforesaid. [*Add counts for money had and received—and upon an account stated.*]

For that whereas the said *C D*, before and at the time of the making of his promise and undertaking, hereinafter next mentioned, was the owner and proprietor of a certain coach or carriage, going and passing from, &c. to, &c. for the carriage and conveyance therein of passengers, and their luggage, for certain hire and reward, to wit, at, &c. And thereupon heretofore, to wit, on, &c. at, &c. aforesaid, in consideration that the said *A B*, at the special, &c. would take and engage a place or seat in the coach or carriage, of the said *C D*, to be carried and conveyed therein, as a passenger, from a certain place, called, &c. to, &c. aforesaid, together with his luggage, to be carried and conveyed by *the said coach, from the said place, called, &c. to, &c. aforesaid, at and for certain reasonable hire or reward, to be therefore paid by the said *A B* to the said *C D* in that behalf, he the said *C D* then and there undertook, &c. to carry and convey the said *A B*, together with his said luggage, in and by the said coach or carriage, from the said place, called, &c. to, &c. aforesaid. And the said *A B*, in fact saith, that although he, confiding, &c. did afterwards, to wit, on, &c. at, &c. aforesaid, take and engage a place or seat in the said coach or carriage, to be carried and conveyed, together with his said luggage, in and by the said coach or carriage, from the said place, called, &c. to, &c. aforesaid, and although the said *A B* from the time of making the said promise, &c. was ready and willing, and on, &c. aforesaid, to wit, at, &c. aforesaid, was ready at the said place, called, &c. to be carried and conveyed, together with his said luggage, in or by the said coach or carriage, from thence, to, &c. aforesaid, and the said *A B* there requested the said *C D*, to carry and con-

28. Against a coach-owner, for not carrying a passenger. (f)

* 120

(f) This count is founded on the undertaking implied by the plaintiff's case, as post.—Which action is having taken a place. If no place sustainable, Bull. N. P. 70. 2 Show. have been taken, and the defendant 327. 1 Show. 105. Dyer, 158. 8 refuse to carry the plaintiff or his Co. 32. 1 Saund. 312. n. c. 5 luggage, having room for that purpose, the declaration should be in T. R. 149. Lord Raym. 652. 654.

Against Defendants.

vey him the said *A B*, together with said luggage, in or by the said coach or carriage, from the said place, called, &c. to, &c. aforesaid. Yet the said *C D*, not regarding, &c. but contriving, &c. did not, nor would, when he was so requested as aforesaid, or at any other time, carry or convey him the said *C D*, together with his said luggage, in or by the said coach or carriage, called, &c. to, &c. but then and there wholly neglected and refused so to do, to wit, at, &c. aforesaid, whereby he the said *A B* was then and there forced and obliged to hire and procure another conveyance, from, &c. aforesaid, to, &c. aforesaid, and was thereby also put to great trouble and inconvenience, and to great expense of his monies, in the whole, amounting to a large sum of money, to wit, &c. and was, and is by means of the premises, otherwise greatly injured and damnified, to wit, at, &c. aforesaid. [*State any special damage which the plaintiff may have sustained, and add a count or counts, omitting the inducement and statement, that the defendant was owner of the coach, and what relates to the luggage—also the money counts—and accounts stated and breach.*]

* 121

29. Against the captain of a ship on his bill of lading for loss of goods. (f)

For that whereas the said *C D*, before and at the time of the making of his promise and undertaking, hereinafter next mentioned, was the master and commander of a certain ship or vessel, called the —, then in the river *Thames*, and bound from thence to *Liverpool*, in the county of *Lancaster*, to wit, at, &c. (the venue.) And thereupon the said *A B*, heretofore, to wit, on, &c. (the date of the bill of lading) in the river *Thames* aforesaid, to wit, at, &c. aforesaid, at the special, &c. caused to be shipped and loaded in and on board of the said ship or vessel, whereof the said *C D* then was such master and commander as aforesaid, divers goods and merchandise, to wit, —, then

(f) As to precedents in this action, see 2 Wentw. Index. Carth. 58. Rep. temp. Hardw. 196. The action may be brought either against the owner or the master of the ship, Carth. 58. Abbott's Shipping, per totum and Index. tit. Master and Owners. If the action be against the owner, the above form will suf-

fice with very little alteration.—In coasting voyages, frequently there is no bill of lading, in which case a part of the description of the contract will be omitted. If there be a charter-party under seal, the action must be founded on the deed, 1 New Rep. 104.

in good order and well conditioned, (*these latter words are to be omitted if not in the bill of lading,*) of great value, to wit, of the value of —*l.* to be taken care of, and safely and securely carried and conveyed by the said *C D* as such master and commander as aforesaid, in and on board of the said ship or vessel, from the river *Thames* aforesaid, to *Liverpool* aforesaid, and there, wit, at *Liverpool* aforesaid, to be safely and securely delivered in the like good order and well conditioned, for the said *A B*, (the dangers of the seas only excepted,)(*g*) and in consideration thereof, and of certain freight and reward to the said *C D* in that behalf, he the said *C D* then and there undertook, &c. to take *care of, and safely, and securely, carry and convey, and deliver the said goods and merchandise as aforesaid, (the dangers of the seas only excepted,) and although the said *C D*, so being such master of the said ship or vessel, as aforesaid, then and there had and received the said goods and merchandise, to be carried, conveyed and delivered as aforesaid, and although a reasonable time for the carrying, conveying and delivering of the said goods and merchandise, as aforesaid, hath long since elapsed, and the said *C D* hath delivered a part of the said goods and merchandise, tow it, —, part thereof for the said *A B*, at *Liverpool*, aforesaid. Yet the said *C D* so being such master and commander of the said ship or vessel as aforesaid, not regarding his duty in that respect, nor his said promise and undertaking, but contriving, &c. to deceive, injure and defraud the said *A B* in this behalf, did not, nor would, take care of, and safely and securely carry or convey the residue of the said goods and merchandise, so shipped in and on board of the said ship or vessel as aforesaid, from, &c. aforesaid, to, &c. aforesaid, and there, to wit, at *Liverpool* aforesaid, safely or securely deliver the same to the said *A B*, (although no danger of the seas did prevent him from so doing,) but on the contrary thereof, he the said *C D*, so being such master of the said ship or vessel as aforesaid, so carelessly and negligently behaved and conducted himself, with respect to the said residue of the said goods and merchandise, that by and through the mere carelessness, negligence and improper conduct of the said *C D* and his mariners and

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ees.

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(*g*) This exception depends on the terms of the bill of lading.

*Against Bail-
ees.* servants in that behalf, the said residue of the said goods and merchandise, being of great value, to wit, of the value of —*l.* became and was wholly lost to the said *A B*, to wit, at, &c. *Second count.* aforesaid. And whereas also heretofore, to wit, on, &c. at, &c. aforesaid, in consideration that the said *A B*, at the special, &c. had then and there caused to be delivered to him the said *C D* divers other goods and merchandise, to wit, &c. of great value, to wit, of the value of, &c. to be taken care of, and safely and securely carried and conveyed by the said *C D* in and on board of a certain other ship or *vessel, from the river *Thames* aforesaid, to *Liverpool* aforesaid, and there, to wit, at *Liverpool* aforesaid, to be safely and securely delivered for the said *A B* for certain freight and reward, to the said *C D* in that behalf, he the said *C D* undertook, &c. to take due and proper care of the said last-mentioned goods and merchandise, whilst he had the care and custody thereof, for the purpose aforesaid, and although the said *C D* then and there had and received the said last-mentioned goods and merchandise for the purpose aforesaid. Yet the said *C D*, not regarding his duty in that behalf, nor his said last-mentioned promise and undertaking, but contriving, &c. whilst he had the care and custody of the said last-mentioned goods and merchandise, for the purpose last aforesaid, took so little and such bad care of the said last-mentioned goods and merchandise, that by and through the mere carelessness and negligence of the said *C D* in that behalf, the said last-mentioned goods and merchandise, being of the value aforesaid, became and were wholly lost to the said *A B*, to wit, at, &c. aforesaid.

30. *Against an agent or auctioneer for not duly accounting for goods delivered to him to sell.* (h) For that whereas heretofore, to wit, on, &c. at, &c. in consideration that the said *A B* at the special, &c. would deliver to the said *C D* divers goods and merchandise of great value, to wit, of the value of —*l.* of lawful, &c. to be sold and disposed of by the said *C D*, for and on the account of the said *A B* for reasonable reward to him the said *C D* in that behalf, he the said *C D* undertook, &c. the said *A B* to sell and dispose of the

(h) As to this action and declaration. 89. 1 Salk. 9. 2 B. & P. 136. 1 tion, see Bull. N. P. 147, 148. Carth. Saund. 50.

said goods, wares and merchandise for the said *A B* and to render a just and true account of the sale thereof to the said *A B*, and of the monies arising from such sale whenever after the sale thereof he the said *C D* should be thereunto requested. And although the said *A B* confiding, &c. did afterwards, to wit, on, &c. aforesaid, at, &c. deliver the said goods and merchandise to the said *C D* for the purpose aforesaid, and although the said *C D* did afterwards, to wit, on, &c. at, &c. aforesaid, sell and dispose of the said goods and merchandise, for and on the account of the said *A B* for divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of —*l.* of like lawful money; yet the said *C D* not regarding, &c. but contriving, &c. hath not rendered to the said *A B* a just and true, or other account of the sale of the said goods and merchandise, or any part thereof, or of the monies arising from such sale or any part thereof, (although he the said *C D* afterwards, to wit, on, &c. at, &c. aforesaid, was requested by the said *A B* so to do,) but the said *C D* hath hitherto wholly refused, and still refuses so to do.

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not account-
ing.

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And whereas also heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said *A B*, at the like special, &c. of the said *C D* had delivered to the said *C D* divers other goods and chattels of great value, to wit, of the value &c. to be sold and disposed of by the said *C D* for the said *A B*, he the said *C D* undertook to render a just and reasonable account of the said last-mentioned goods and chattels to the said *A B* whenever afterwards he the said *C D* should be thereunto requested. And although the said *C D* then and there had and received the said last-mentioned goods and chattels of and from the said *A B* for the purpose last aforesaid; yet the said *C D* not regarding, &c. but contriving, &c. hath not rendered to the said *A B* a just and reasonable or other account of the said last-mentioned goods and chattels, or any part thereof, (although the said *C D* afterwards, to wit, on, &c. aforesaid, at &c. aforesaid was requested by the said *A B* so to do,) but the said *C D* hath hitherto wholly refused, and still wholly refuses so to do. [*Add counts for money had and received—the account stated—and breach.*]

Second count.

31. Against the vendor of an estate at public auction for not making a good title.

Second count, for not delivering an abstract of good title in due time. (i)

*For that whereas the said *C D* heretofore, to wit, on, &c. at, &c. caused to be put up and exposed to sale, by public auction, a certain messuage or tenement, outhouses, and divers, to wit, — acres of land with the appurtenances, situate, &c.

(describe the premises and the conditions as in the particulars of sale,) upon, and subject to the following, amongst other conditions, that is to say, that the purchaser should pay to the

vendor or his agent, a deposit of —*l.* per cent. in part of the purchase-money, and should likewise pay one-half of the auction duty, and should also pay the remainder of the purchase-money, and complete the purchase on or before the — day, of — then next, and that a good title should be made out at the expense of the vendor, and upon payment of the remainder of the purchase-money, a proper conveyance at the purchaser's expense. And the said *A B* in fact saith, that on such exposure to sale as aforesaid, to wit, on, &c. aforesaid, at, &c. aforesaid, he the said *A B* became and was the purchaser of the said tenements, with the appurtenances, upon and according to the said conditions, for a certain price, to wit, the sum of —*l.* of lawful, &c. and then and there paid to the said *C D* a large sum of money, to wit, the sum of —*l.* as a deposit of 10*l.* per cent. in part of the said purchase-money, and then and there also paid another large sum of money, to wit, the sum of —*l.* of like lawful money, as one-half of the said auction-duty payable in that behalf. And thereupon afterwards, to wit, on the, &c. aforesaid, *at, &c. aforesaid, in consideration that the said *A B*, at the special, &c. of the said *C D*, had then and there undertaken, and faithfully promised the said *C D* to perform and fulfil all things in the said conditions of sale contained, on his part and behalf, as such purchaser as

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(i) If the vendor of the estate be not prepared to produce his title-deeds, or make a good title at the appointed day, the purchaser may recover back the deposit money under the count for money had and received, 2 Esp. Rep. 641, 642. proving in the latter case, the defect in title, 4 Esp. Rep. 221. Unless there be fraud, no damages for the loss of the bargain are recoverable, 2 Bl. Rep.

1078. and to recover interest and expenses, (as to which, see 2 Bl. Rep. 1079. 4 Esp. Rep. 223.) the declaration must be special, as above, id. ibid. 1 B. & P. 306. When the action is for not making a good title, and the declaration is special, the court will compel the plaintiff to give the defendant particulars of all objections to the title founded on matter of fact, 3 B. & P. 246.

aforesaid, to be performed and fulfilled; he the said *C D* undertook, &c. to perform and fulfil all things in the said conditions of sale contained, on the vendor's part and behalf to be performed and fulfilled. And the said *A B* saith that although he, on, &c. aforesaid, (*the first day,*) and from thence until and upon the said — day of — then next, at, &c. aforesaid, was ready and willing to perform and fulfil all things in the said conditions contained, on his part and behalf, as such purchaser as aforesaid, to be performed and fulfilled, and to pay the remainder of the said purchase-money, and to complete the said purchase, whereof the said *C D*, on, &c. last aforesaid, there had notice, and was then and there requested by the said *A B*, to make to him a good title to the said messuage, &c. yet the said *C D* not regarding, &c. but contriving, &c. did not, nor would, when he was so requested as aforesaid, or at any time before or since, make, or procure to be made to the said *A B*, a good title to the said messuage, &c. but hath hitherto wholly neglected and refused so to do, to wit, at, &c. aforesaid, contrary to the said conditions of sale, and the said promise and undertaking of the said *C D*. By reason whereof he the said *A B* hath been deprived of all the benefits and advantages which would have arisen from the completion of the said purchase, and hath been put to great expenses, amounting in the whole to a large sum of money, to wit, the sum of —*l.* of like lawful money, in endeavouring to procure such title as aforesaid, and to get the said purchase completed, and hath lost all gains and profits which he might and would otherwise have made and acquired from using and employing the said sums of money, so paid by him as deposit and duty as aforesaid, and other monies provided and kept by him the said *A B* for the completion of the purchase, to wit, at, &c. aforesaid.

*And *whereas also*, heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration that the said *A B*, at the special, &c. had then and there bargained with the said *C D* for the purchase of a certain other messuage, &c. with the appurtenances, at and for a large sum of money, to wit, &c. and had paid to the said *C D* a certain sum, to wit, &c. in part of the said last-mentioned purchase-money, and had also agreed to pay the residue thereof, and to accept a proper conveyance of the said

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Second count.

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not conveying.

last-mentioned messuage, &c. on or before the — day of —, in the year aforesaid, on having a good and valid title made to him to the same messuage, &c. He the said *C D*, then and there, to wit, on, &c. aforesaid, at, &c. aforesaid, undertook, &c. that he the said *C D*, would procure an abstract of a good and valid title to the said last-mentioned messuage, &c. to be furnished to the said *A B* in due and convenient time for enabling him to get such title examined, and a proper conveyance of the same messuage, &c. prepared, and the said last-mentioned purchase completed on or before, &c. aforesaid. Yet the said *C D* not regarding, &c. did not, nor would, although, &c. procure an abstract of a good and valid title to the said last-mentioned messuage, &c. to be furnished, &c. (*negating the performance of the promise.*) but therein wholly failed and made default, to wit, at, &c. aforesaid, and the said *C D* then and there wrongfully and injuriously neglected, and omitted to furnish any abstract of title to such messuage, &c. as last aforesaid, for a long and unreasonable time, and until an insufficient and inadequate time remained for the examination of such title, and for the preparation of a proper conveyance, and the completion of such purchase as last aforesaid, by the day appointed for that purpose as aforesaid, according to the said last-mentioned promise of the said *C D* in that behalf, and the said *A B* in fact, further saith that by means and in consequence of such neglect and omission as aforesaid, and by reason of *E F*, (without whose joining in the conveyance of the said last-mentioned messuage, &c. a good title thereto could not be made,) having since departed *this life, to wit, at, &c. aforesaid, the said *A B* hath been deprived of all benefit and advantage, which would have arisen to him from the completion of the said last-mentioned purchase, and hath necessarily been put to great expenses, amounting in the whole to a large sum of money, to wit, &c. in endeavouring to procure the said title, as last aforesaid, and hath lost, &c. [*same damage as in last count. Add counts for money paid—had and received—account stated—and breach.*]

* 128.

32. Against a
publican on
an agreement
to assign his
lease, and on

For that whereas the said *C D*, before and at the time of the making of the agreement and his promise and undertaking his implied contract, that he had lawful title so to do,

hereinafter next mentioned, represented to the said *A B*, that he the said *C D* was lawfully possessed for the residue and remainder of a certain term of years then to come and unexpired therein, of a certain messuage or dwelling-house and premises, situate, &c. wherein he the said *C D* then exercised and carried on the business of a victualler, to wit, at, &c. and thereupon heretofore, to wit, on, &c. at, &c. aforesaid, by a certain agreement then and there made, by and between the said *C D* and the said *A B*, it was agreed in manner and form following, (that is to say,) &c. [*Here set out the agreement verbatim, and state mutual promises, ut ante, 76. and that defendant also undertook as follows:*] and that he the said *C D* then and there had lawful right to sell and assign over the said lease of the said messuage or dwelling-house to the said *A B*, and that he would perform and fulfil the said agreement in all things therein contained on his part and behalf, to be performed and fulfilled. And although the said *A B* hath always, &c. [*General performance by plaintiff.*] Yet the said *C D* contriving, &c. did not perform or regard the said agreement, or his said promise and undertaking, but thereby craftily and subtly deceived the said *A B* in this, to wit, that he the said *C D*, at the time of making the said agreement, and his said promise and undertaking as aforesaid, had not lawful right to sell or assign over the lease of the said messuage or dwelling-house and premises to the said *A B*, whereby the said *C D* was hindered and prevented from selling or assigning over the same, or performing the said agreement, on the part and behalf of him the said *C D*, and by means of the said several premises, he the said *A B* not only lost and was deprived of all the profits, benefits and advantages, which might and would otherwise have arisen and accrued to him from the performance of the said agreement, on the part and behalf of the said *A B*, but was forced and obliged to and did necessarily lay out and expend a large sum of money, to wit, the sum of —.l. of lawful, &c. in and about the appraisement and valuation of the said household furniture, and hath been and is by means of the premises, otherwise greatly injured and damnified, to wit, at, &c. aforesaid.

XXXII. *A.*
against a pub-
lican.

Vendor against purchaser.

[As there are several precedents in print by a vendor against a vendee for not completing his purchase, it is unnecessary here to insert any: See a declaration by a vendor seized in fee against a purchaser at a public auction for non-payment of the purchase money, and the law relative to these declarations in 6 East, 555. 3 East, 410. 2 H. Bl. 123. and against a purchaser of an estate in fee by private agreement, 2 Wentw. 91. 1 H. Bl. 270. and against a purchaser of a chattel interest, *Jones v. Barkley*, Doug. 684. and *Luxton v. Robinson*, Doug. 620. From these it appears, that the plaintiff must shew that he had good title to convey. The following precedent is however given, as it often occurs in practice:]

23. On a public-house agreement against the vendee. (i)

First count, for not procuring a broker to appraise the stock, &c.

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For that whereas the said *A B*, before and at the time of the making of the agreement and the promise and undertaking of the said *C D*, hereinafter next mentioned, was lawfully possessed, that is to say, for the residue of a certain term of years, to expire on, &c. of a certain dwelling-house *and premises, with the appurtenances, known by the sign of the —, situate, &c. and the said *A B* was also then lawfully possessed of certain beer and other licenses, and of certain liquors, and also of certain household furniture, fixtures and other effects, then being on the said premises, to wit, at, &c. And thereupon heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, by a certain agreement then and there made between the said *A B*, of the one part, and the said *C D*, of the other part, it was agreed by and between the said *A B* and the said *C D*, that the said *A B* should, &c. [Here copy the agreements verbatim to the following words:] But that if either of them should neglect or refuse to perform the said agreement on his part, the party so neglecting or refusing, should pay to the other of them the sum of —l. on demand, by the said agreement mutually agreed to be the damages ascertained and fixed(k) on breach thereof, and to become a just debt, and recoverable in any of his ma-

(i) As to declarations of this nature, see the above observations, and *Doug. 620. 684.* As to liquidated damages, 2 H. & P. 346. 3 B. & P. 632. and not in the nature of a penalty. As to the distinction between a penalty and liquidated damages, see 2 B. & P. 346. and 3 B. & P. 632.

(k) These damages are liquidated,

jesty's courts of law. As by the said agreement, reference being thereunto had, will fully appear. And, &c. [*State mutual promises to perform the agreement, ut ante, 76. and proceed with the averment as follows:*](1) And although the said *A B*

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was always from the time of the making of the said agreement, until and upon the said — day of —, to wit, at, &c. aforesaid, ready and willing to assign and convey his said estate and interest in the said dwelling-house and premises, with the appurtenances, to the said *C D*, and to assign and deliver to the said *C D* the said beer and other licenses, and to mend and allow for all the damaged windows of the said messuage and premises, with the appurtenances, and to clear the said premises from all incumbrances of rent and taxes, and to sell and deliver to the said *C D* the said household furniture, fixtures, liquors and other effects, at a fair appraisement thereof, as aforesaid, and also to deliver possession, and complete and fulfil the said agreement upon the said — day of —, at the joint expense of himself and the said *C D*, according to the effect and meaning of the said agreement in that behalf, and although the said *A B* afterwards, to wit, on, &c. aforesaid, appointed and procured one *E F*, a broker, on his part, in order to make a fair appraisement and valuation of the said household furniture, fixtures, liquors and effects, and the said *E F* was then and there ready to appraise and value the same accordingly. And although the said *C D* then and there had notice of the premises, and was requested by the said *A B* to appoint and procure some person as a broker on his part, to make such appraisement and valuation, and to perform the said agreement on his part, according to the effect and meaning thereof. Yet the said *A B* in fact saith, that the said *C D* did not, nor would, when he was so requested, as aforesaid, or at any other time appoint or procure a broker on his part, to appraise and value the said household furniture, fixtures, liquors and other effects, or any of them, according to the effect and meaning of the said agreement, but hath hitherto wholly neglected and refused so to do, and by reason thereof

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(1) The averments of performance on the part of the plaintiff must always depend on each particular agreement; those in the precedent are such as most frequently occur in actions on public-house agreements.

Vendor a-
gainst pur-
chaser.

Second count,
for prevent-
ing plaintiff's
broker from
valuing.

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the said household furniture, fixtures, liquors and other effects, still remain unvalued and unpaid for by the said *C D*, to wit, at, &c. aforesaid, contrary to the said agreement and the said promise and undertaking of the said *C D*, whereby the said *C D* hath become liable to pay the said *A B* the said sum of 200*l*. in the said agreement mentioned, when he the said *C D* should be thereunto afterwards requested. And whereas also, the said *A B* heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, was lawfully possessed of a certain other dwelling-house, with the appurtenances, situate, &c. for the residue of a certain term of years, to expire on, &c. in which said last-mentioned dwelling-house the *business of a victualer had been and then was carried on by virtue of certain licenses then also in the possession of the said *A B*, and the said *A B* was also then and there possessed of certain other effects in the said dwelling-house, whereof the said *C D* then and there had notice. And the said *A B* being so possessed thereupon, heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, in consideration^(m) that the said *A B*, at the like special instance and request of the said *C D* and for the sum of —*l*. then and there paid to the said *A B* by way of earnest, and such further sum of money as the said last-mentioned effects should be valued at upon a fair appraisement by a broker on each side, or their umpire, to be paid to the said *A B* as hereinafter mentioned, had agreed, &c. [*State the substance of the agreement in the first count, with proper averments, and proceed as follows :*] And although the said *A B* afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, nominated and appointed one *E F*, a broker, to value and appraise the said last-mentioned effects for and on behalf of the said *A B*, and the said *C D* then and there had notice of the premises last aforesaid, and then and there nominated and appointed a certain other person, to wit, one *G H*, using the trade of a broker, as such broker to appraise and value the same effects, for and on behalf of him the said *C D*, and although the said *E F* and *G H* as such brokers as aforesaid, then and there began such valuation and ap-

(m) As to the necessity for the derivation on each side, see 6 East, statement of the whole of the consi- 568, 569.

praisement, and the same would have been proceeded with and completed, if the said *C D* would have suffered and permitted the said *G H* to have proceeded therein; yet the said *C D*, not regarding his said last-mentioned promise and undertaking, but contriving, and intending to deceive and defraud the said *A B* in this behalf, did not, nor would, (although often requested so to do) suffer or permit the said *G H* to proceed in, or go on with the valuation and appraisement of the said last-mentioned effects on his part, but afterwards and before the completion thereof, to wit, on, &c. aforesaid, at, &c. aforesaid, wholly refused to suffer or permit him so to do, and then and there countermanded and prevented the said *G H*, from proceeding and going on with the said valuation and appraisement, and then and from thence hitherto hath neglected to nominate or appoint any other person, to value or appraise the said last-mentioned effects for and on behalf of him the said *C D*, and hath hindered and prevented the completion of such valuation and appraisement as last aforesaid, and the same effects still remain wholly unpaid for, by him the said *C D*, to wit, at, &c. aforesaid, contrary to the said last-mentioned promise and undertaking of the said *C D*, to wit, at, &c. aforesaid. [*Add one count for a leasehold estate bargained and sold, ante, 7. Two counts for goods bargained and sold, ante, 17.—money paid—and the account stated.*]

Vendor against purchaser.

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For that whereas the said *C D*, heretofore, to wit, on, &c. at, &c. was tenant to the said *A B*, of a certain farm, lands

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(n) If the tenancy be under a lease, and the lessee executed the same or a counterpart, (see 4 Esp. Rep. 42.) the remedy is by covenant or by action on the case where waste has been committed, 2 Bl. Rep. 1111. though the writ of waste would not be sustainable, Co. Litt. 54. b. n. 1. When there is an agreement not under seal containing a stipulation, for the breach of which the action is brought, on a count should be on the express agreement, stating mutual promises and the breaches, according to the terms of the agreement, see 2 Bl. Rep. 840. Case might also be supported when waste has been committed, 2 Bl. Rep. 111. The law implies a contract on the part of a tenant, that he will occupy a farm, &c. in a tenant-like manner, and *assumpsit* may be supported for the breach of such implied contract, 5 T. R. 373. 4 East, 154. where see

34. Landlord against a tenant from year to year (n) on implied contract to use the premises in a husband-like manner and according to the custom of the country. Breaches, over cropping and carrying off manure, &c.

DECLARATIONS IN ASSUMPSIT.

Landlord against tenant.

and premises, with the appurtenances, situate, &c. and in consideration thereof, he the said *C D* then and there undertook, &c. to manage use and cultivate the said farm, lands and premises, with the appurtenances, during the said tenancy, in a good husbandlike manner, and according to the custom of the country, where the said farm, lands and premises were so situate, as aforesaid. And the said *A B*, in fact saith, that the said *C D* was and continued tenant to the said *A B* of the said farm, lands and premises, with the appurtenances, for a long space of time, to wit, from the time of making his said promise and undertaking until the — day of —, *A. D.* 1804, (or "*hitherto*") to wit, at, &c. aforesaid. Yet the said *C D*, not regarding his said promise, &c. but contriving, and wrongfully and unjustly intending to injure the said *A B* in this behalf, did not, nor would, during the continuance of the said tenancy as aforesaid, manage, use or cultivate the said farm, lands and premises, with the appurtenances, in a good and husband-like manner, and according to the custom of the country, where the said farm, lands and premises, were so situate as aforesaid, but on the contrary thereof, after the making of his said promise and undertaking, and during the continuance of the said tenancy, to wit, in the successive years of our Lord —, and — wrongfully and injuriously overcropped the said land, and cropped, planted and sowed divers, to wit, — acres of the said farm, lands and premises, with divers, to wit, two successive crops of wheat, barley, peas, beans, tares and oats, that is to say, — acres, part thereof with wheat, — acres, other part thereof with barley, — acres, other part thereof with peas, — acres, other part thereof with tares, and the residue thereof with oats, the same, according to the course of good husbandry, then and there being excessive and unreasonable crops for the said land, and contrary to the course

a good precedent. When a tenant holds the possession of premises after the expiration of a lease, by the permission of his landlord, he impliedly engages to observe the same covenants as are contained in the lease, though the remedy must be *assumpsit*, or case, 1 H. Bl. 99. 1 T. R. 162. 5

T. R. 471. 1 Esp. Rep. 57. And in such case it may be advisable, in one count, to state the covenants in the lease, that such lease was determined—that the defendant had become tenant, and his *assumpsit* to perform the covenants, 1 H. Bl. 99.

of good husbandry, and the custom of the country where the said farm, lands and premises were so situate as aforesaid, and contrary to the said promise and undertaking of the said *C D*, to wit, at, &c. aforesaid, —; *and the said *A B* in fact, further saith, that the said *C D*, further disregarding his said promise and undertaking, and further contriving and intending to injure the said *A B* in this behalf, after the making of his said promise and undertaking, and during the continuance of the said tenancy, did not, nor would, spend, use and employ on the said farm, lands and premises, the hay, straw, soil, dung, compost and manure, which grew, arose, and was made thereon, during the continuance of the said tenancy, as he the said *C D*, according to the course of good husbandry, ought to have done, but on the contrary thereof, he the said *C D* during the continuance of the same tenancy, to wit, on, &c. aforesaid, and on divers other days and times between that day and the — day of —, at, &c. aforesaid, took and carried away, off, and from the said farm, lands and premises, divers large quantities, to wit, two hundred cart-loads of hay, two hundred cart-loads of straw, two hundred cart-loads of soil, two hundred cart-loads of dung, two hundred cart-loads of compost, and two hundred cart-loads of manure of great value, to wit, of the value of 200*l.* and which had arisen and been made on the said farm, lands and premises, during the said tenancy, and spent and consumed the same elsewhere than on the said farm, lands and premises, or any part thereof, contrary to the course of good husbandry and the custom of the country where the said farm, lands and premises were so situate as aforesaid; and also contrary to the said promise and undertaking of the said *C D*. By means of which said several premises, the said farm, lands and premises, with the appurtenances, became and were greatly impoverished, and rendered less productive than the same otherwise would have been, and greatly deteriorated in value, to wit, at, &c. aforesaid. [*It may, in some cases, be advisable to add a second count, similar to the first, leaving out what relates to the custom of the country, lands, &c. and also to insert a count as in 4 East, 155. stating the promise as in the first count, and a general *breach of good husbandry, without stating the particulars, see 3 T. R. 507.*]

Landlord against tenant.

* 135

Second breach.

* 136

Landlord against tenant.

35. Breach for ploughing up grass land, and cropping the land without manuring the same.

[*Same as the above precedent, to the obelisk, and then proceed as follows.*]—on, &c. ploughed up and converted into tillage a certain piece, or parcel of land then in grass, called, &c. and parcel of the said farm and lands, and cropped and sowed the same without manuring or dressing the same with sand and other manure, as he the said *C D* ought to have done, according to the course of good husbandry, and the custom of the country where the same farm, &c. were so situate as aforesaid; contrary to the course of good husbandry, and the custom of the country aforesaid, and to the said promise, &c. of the said *C D*, to wit, at, &c. aforesaid.

36. For taking successive crops without manuring the land.

[*Same as the above precedent, to the obelisk.*] In the successive years of our Lord, 1802, 1803, 1804, wrongfully and injuriously cropped, planted and sowed, a certain other piece or parcel of land, called, &c. part and parcel of the said farm and lands, with divers, to wit, four successive crops of corn, potatoes and turnips, to wit, wheat, potatoes, turnips and wheat; and also without manuring or dressing the said last-mentioned land with sand and manure, as according to the course of good husbandry he the said *C D* ought to have done, contrary to the course, &c. and custom, &c. where the said farm, &c. were so situate as aforesaid, and contrary to his said promise, &c. to wit, at, &c. aforesaid.

37. Against tenant, for keeping and leaving the premises out of repair, contrary to implied contract.
(o)

For that whereas the said *C D*, heretofore, to wit, on, &c. at, &c. had become and was tenant to the said *A B* of

(o) In this case also, if there were an express contract, or written agreement, it should be declared upon, as stated in the note to the precedent, *ante*, 133. n. (n). If the action be for not taking care of furniture, &c. see a precedent, *ante*, 109. The law implies a contract on the part of a tenant from year to year, to keep the premises in tenantable repair and not to commit waste, 1 Saund. 323. b. n. 7. Co. Litt. 57. a. but he is not bound to make substantial repairs in

main beams, &c. 2 Esp. Rep. 590. Case also may be supported against a tenant from year to year, for permissive as well as voluntary waste, see 2 Saund. 252. c. and the precedents there given; but case cannot be supported for permissive waste against a mere tenant at will, 1 New-Rep. 290. 1 Saund. 323. b. As to what fixtures a tenant may remove, and at what time, see 2 East, 88. 4 East, 38.

A certain messuage, garden and premises, with the appurtenances, situate, &c. and in consideration thereof, he the said *CD* then and there undertook, &c. that he the said *CD* would, during the continuance of the said tenancy, keep the same messuage, garden and premises, with the appurtenances, in tenantable repair, order and condition. And the said *AB* avers, that the said *CD* was, and continued tenant of the said messuage, garden and premises, with the appurtenances, to the said *AB*, for a long space of time, to wit, from the time of making his promise and undertaking aforesaid, until and upon, &c. Nevertheless the said *CD*, not regarding his said promise and undertaking, but contriving, &c. did not, nor would, after the making of his said promise and undertaking, and during the continuance of the said tenancy, keep the said messuage, garden and premises, with the appurtenances in tenantable repair, order and condition, according to his said promise and undertaking; but on the contrary thereof, he the said *CD*, after the making of his said promise and undertaking, and during the continuance of his said tenancy, to wit, on the day and year first above mentioned, and from thence until and upon the said, &c. wrongfully and unjustly suffered and permitted the said messuage, garden and premises, with the appurtenances, to be and continue, and the same were for and during all that time ruinous, prostrate, foul and in bad and untenable repair, order and condition, for want of needful and necessary repairing, &c. thereof. And afterwards, to wit, on the said, &c. he the said *CD* wrongfully and unjustly yielded and delivered up to the said *AB* the said premises so ruinous, prostrate, broken down, foul, bad and in untenable order, repair and condition, as aforesaid, contrary to his said promise and undertaking, to wit, at, &c. And whereas also heretofore, to wit, on, &c. at, &c. aforesaid, in consideration that the said *CD* had become, and then was tenant to the said *AB* of a certain other messuage, garden and premises, with the appurtenances, he the said *CD* undertook, &c. to use the said last-mentioned messuage, garden and premises, with the appurtenances, in a tenant-like and proper manner, for and during the continuance of the said last-mentioned tenancy.— And although the said last-mentioned tenancy did continue and endure for a long space of time, to wit, from the day and year

Lanilford against tenants.

* 138

Second count, for using the premises in an untenant-like manner.

Landlord against tenant.

last aforesaid, until and upon, &c. to wit, at, &c. aforesaid. Yet the said *C D* not regarding his said last-mentioned promise and undertaking, but contriving and fraudulently intending to deceive and injure the said *A B*, did not, nor would, during the continuance of the said last-mentioned tenancy, use the said last-mentioned messuage, garden and premises, with the appurtenances, in a tenant-like and proper manner. But on the contrary thereof, he the said *C D* during the continuance of the said last-mentioned tenancy, so improperly behaved and conducted himself in that behalf, and used the said last-mentioned messuage, garden and premises, with the appurtenances, and the trees therein, in so untenant-like and improper manner, that by reason thereof the said last-mentioned messuage, garden and premises, with the appurtenances, then and there became, and were, and still are, ruinous, broken down, destroyed, prostrated, foul, miry and greatly dilapidated, and the trees of the said *A B* growing in and upon the said last-mentioned premises became and were greatly damaged and spoiled, to wit, at, &c. aforesaid.

38. By tenant against landlord on implied contract, to indemnify tenant against payment of ground rent.

(p)

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For that whereas before and at the several times hereinafter mentioned, the said *C D* held a certain messuage and premises, with the appurtenances, situate, &c. as tenant thereof, to one *E F*, at and under a certain yearly rent, to wit, &c. payable by the said *C D* to the said *E F*, to wit, at, &c. and thereupon heretofore, to wit, on, &c. at, &c. in consideration that the said *A B*, at the special instance, &c. had become and was tenant to the said *C D* of the said messuage and premises, with the appurtenances, at and under a certain yearly rent, to wit, &c. therefore payable by the said *A B* to the said *C D*, he the said *C D* undertook, &c. during the continuance of the said last-mentioned tenancy, to indemnify and save harmless him the said *A B*, from and against the payment of the said yearly rent so payable to the said *E F* as aforesaid, and from and

(p) As to declarations for not indemnifying, see ante, 88. A stranger whose goods have been distrained, may support *assumpsit* for money paid, 8 T. R. 308.

against any distress or action, costs, charges, damages or expenses, which should, or might be made, brought, arise or happen, for or by reason of the non-payment thereof. And although the said tenancy of the said *A B* was and continued for a long time after the making of the said promise and undertaking of the said *C D*, to wit, thence hitherto. Yet the said *A B* in fact saith, that the said *C D*, not regarding, &c. but contriving, &c. did not, nor would, during the continuance of the said tenancy of the said *A B* as aforesaid, indemnify, or save harmless, him the said *A B* according to his said promise and undertaking, but wholly neglected so to do, to wit, at, &c. aforesaid, and by reason thereof, after the making of the said promise and undertaking of the said *C D*, and during the continuance of the said respective tenancies, and whilst the said *A B* occupied and enjoyed the said messuage and premises, with the appurtenances, as such tenant as aforesaid, to wit, on, &c. a certain distress was made by and on the behalf of the said *E F*, on certain goods and chattels of the said *A B* then in and upon the said messuage and premises, for a certain sum of money, to wit, the sum of —*l.* of lawful, &c. then due and in arrear to the said *E F*, for and in respect of the said yearly rent so payable to him as aforesaid, and by means of the premises he the said *A B* was not only put to and suffered great trouble and inconvenience, but was forced and obliged to, and did necessarily pay the said sum of —*l.* together with the charges of the distress, in the whole amounting to a large sum of money, to wit, the sum of —*l.* and was, and is, by means of the premises, otherwise greatly injured and damnified, to wit, at, &c. aforesaid. [*Add the count for money paid—account stated—and breach.*]

Tenant against landlord.

III. DECLARATIONS IN DEBT.

I. BEGINNING AND CONCLUSION.

Markham and Le Blanc.

Thursday(b) next after fifteen days of St. Hilary, in Hilary Term, 47 Geo. III.

1. Declaration in debt, in K. B. by bill or latitat. (a)

Middlesex, (to wit.) (c) *A B* complains of *C D*, being in the custody of the marshal(d) of the marshalsea of our lord the now king, before the king himself, of a plea that he render to the said *A B*, the sum of —*l.*(e) of lawful money of *Great Britain*, which he owes to and(f) unjustly detains from him. For that whereas, &c. [*Here state the subject matter(g) of the debt, the breach as post, 144. and conclude as follows :*]. To the damage of the said *A B* of —*l.*(h) and therefore he brings his suit, &c. Pledges, &c.

(a) For the forms in C. P. and the Exchequer, see the *Forms of Courts*.

(b) As to the title of the term, see *ante*, 1. n. (a).

(c) As to the venue, see vol. 1. *Index*, tit. *Venue*.

(d) *Ante*, 1. n. (c).

(e) This sum is to be the aggregate of all the sums mentioned in the different counts. In debt on simple contract, the plaintiff may prove and recover less than the sum demanded in the commencement, or in each count, 1 H. Bl. 251. 547. Vin. Abr. tit. *Miscasting*.

(f) Debt is in general to be in the *debet* and *detinet*, Com. Dig. Pleader, 2 W. 8. Gilbert on Debt, 399, 400, 401. 359. but in actions by or against executors and administra-

tors suing in that character, in general it must be in the *detinet* only, see Com. Dig. Pleader, 2 D. 1, 2. 2 W. 8. 1 Saund. 1. 112. n. 1. 216. 3 East, 2. Lord Raym. 698. So in the *detinet* for goods, Gilbert on Debt, 400, 401. 359. husband and wife are to be sued in the *debet* and *detinet*, Gilb. 402. Omission of both the *debet* and *detinet*, is demurrable, 6 Mod. 306.

(g) As to declarations in debt in general, see Com. Dig. Pleader, 2 W. 7. &c.

(h) This sum is in general merely nominal. If there be a demand for interest, insert a count for the same, in debt, as *ante*, 42. As to the conclusion in debt *qui tam*, see *ante*, 4 n. (a).

*II. ON SIMPLE CONTRACTS.

Common
counts.

And whereas also the said *C D* afterwards, to wit, on, &c. at, (t) &c. aforesaid, was indebted to the said *A B* in the sum of —l. of like lawful money, for, &c.

1. Form of the *indebitatus* count in debt. (i)

[Here state the subject matter of the debt, whether for land, goods, work or money, precisely as in *assumpsit*, ante, 7 to 44. and then proceed as follows :]

And to be paid by the said *C D* to the said *A B*, when he the said *C D* should be thereunto afterwards requested, (l) whereby and by reason of the said last-mentioned sum of money, being and remaining wholly unpaid, an action hath accrued to the said *A B* to demand and have of, and from the said *C D*, the said sum of —l. parcel of the said sum above demanded.

And whereas also afterwards, to wit, on, &c. aforesaid, at &c. aforesaid, in consideration that the said *A B*, at the like special instance and request of the said *C D*, had before that time,

2. Form of the *quantum meruit* count in debt. (m)

(i) This form is usually adopted : formerly the count did not state that the defendant was indebted, &c. but was as follows : "and whereas also the said *C D*, on, &c. at, &c. bought of the said *A B*, certain, &c. for —l. to be therefore paid by him the said *C D* to the said *A B*, when he the said *C D* should be thereunto requested ;" and then the other counts followed, omitting the "whereby," &c. in the above precedent, and averring at the end of the last count, "that all the sums mentioned in the different counts together amount to the sum first demanded ;" see *Aston's Ent.* 209, 210. 2 *Mallory's Ent.* 177. *Fortes.* 198. But in the declaration in *Emery v. Fell*, 2 *T. R.* 28,

and *MS Prec.* 23. V. 127. (which contained counts for goods sold, work and labour, and all the money counts,) each count began with the statement, "that the defendant was indebted," &c. as above, omitting, however, the "whereby," &c.

(k) This is sufficient, see 2 *T. R.* 28.

(l) This appears to be unnecessary, see n. (i).

(m) As to this count, see vol. 1. Index, tit. Debt. The *quantum meruit* count seems in no case to be necessary, ante, 6. n. (t). 1 *H. Bl.* 249. Vin. Abr. tit. Miscasting. This is the form usually adopted, but it may be framed stating, "that *C D* bought," &c. *Fortes.* 198.

Common counts.

[* *Here state the subject matter of the debt, as in the quantum meruit count in assumption, ante, 7 to 42, and then proceed as follows :*]

He the said *C D* undertook, and then and there agreed to pay to the said *A B*, so much money as he therefore reasonably deserved to have of the said *C D*, when he the said *C D* should be thereunto afterwards requested. And the said *A B* avers, that he therefore reasonably deserved to have of the said *C D*, the further sum of —*l.* of like lawful money, to wit, at, &c. aforesaid, whereof the said *C D* afterwards, to wit, on, &c. aforesaid, there had notice, whereby an action hath accrued to the said *A B*, to demand and have of and from the said *C D*, the said last-mentioned sum of —*l.* other parcel of the said sum above demanded.

Money lent.
(n)

And whereas also the said *A B* afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, at the like special instance and request of the said *C D*, lent to the said *C D*, and the said *C D* then and there borrowed of the said *A B*, a large sum of money, to wit, the sum of —*l.* of like lawful money, to be paid by the said *C D* to the said *A B*, when he the said *C D*, should be thereunto afterwards requested,† whereby and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said *A B*, to demand and have of and from the said *C D*, the said last-mentioned sum of —*l.* other parcel of the said sum above demanded.

Money paid.
(o)

And whereas also the said *A B* afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, hath paid, laid out and expended, a certain other sum of money, to wit, the sum of —*l.* of like lawful money, for the said *C D*, and at his like special instance and request, and to be paid by the said *C D* to the said *A B*, when he the said *C D* should be thereunto afterwards requested, whereby, &c. [*same as above, from the obitusk to the end.*]

* 144

(n) This is according to the old defendant was indebted, &c. See forms, Ast. Ent. 209. 2 Mall. 177, ante, 142 n: (i).
178. but the count may state that the (o) *Id. ibid.*

And whereas also, the said *C D* afterwards, to wit, on, &c. *Common counts.* *Money had and received.* (p)
 aforesaid, at, &c. aforesaid, had and received a certain other sum of money, to wit, the sum of —*l.* of like lawful money, to and for the use of the said *A B*, and to be paid by the said *C D* to the said *A B*, when he the said *C D* should be thereunto afterwards requested, whereby, &c. [*same as above, from the obelisk to the end.*]

And whereas also, the said *C D* afterwards, to wit, on, &c. *Account stated.* (q)
 aforesaid, at, &c. aforesaid, accounted with the said *A B*, of and concerning divers other sums of money before that time and then due and owing, and in arrear, and unpaid, from the said *C D* to the said *A B*, and upon that accounting, the said *C D* was then and there found to be in arrear and indebted to the said *A B*, in the further sum of —*l.* of like lawful money to be paid by the said *C D* to the said *A B*, when he the said *C D* should be thereunto afterwards requested, whereby and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said *A B*, to demand and have of and from the said *C D*, the said last-mentioned sum of —*l.* residue of the said sum above demanded.

Yet the said *C D*, although often requested so to do, hath *Breach.* (r)
 not as yet paid the said sum of —*l.* above demanded, or any part thereof, to the said *A B*. But he to do this hath hitherto wholly refused, and still doth refuse. To the damage of the said *A B* of —*l.* (s) and therefore he brings his suit, &c.

Pledges, &c.

(p) *Id. ibid.*

(q) As to this count, see *Ant. Ent.* 209, 210. 2 *Mall.* 177.

(r) For the different breaches, when the action is brought by or against any particular persons, as surviving partners, &c. *ante*, 45 to 71.

(s) The sum here to be inserted is in general 10*l.* or any other sum, though less than the real demand.

If there be a demand for interest, insert a count for the same in debt, *ante*, 42.

*III. ON AWARDS, &c.

1. Declaration on an award, where the submission was by arbitration bonds. (t)

For that whereas certain differences having arisen and being depending between the said *A B* and the said *C D*, the said *A B* heretofore, to wit, on, &c. at, &c. by a certain bond of arbitration, bearing date, &c. became bound to the said *C D* in a certain penal sum, in the said bond mentioned; and the said *C D* then and there, by a certain other bond of arbitration, bearing date, &c. became and was bound to the said *A B* in a certain penal sum in the same bond mentioned, which said bonds were respectively conditioned to (u) abide the award and determination of *E F*, of, &c. an arbitrator indifferently elected and named, as well on the part and behalf of the said *C D* as of the said *A B*, to arbitrate, award, order, adjudge and determine of and concerning all, and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever, at any time theretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed or depending, by and between the said parties, or any or either of them, so as the said award should be made, and ready to be delivered to the said parties in difference, or such of

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(t) See the precedents, 7 Wentw. Index, 514. As to this declaration, and the action on awards in general, see the precedent in *assumpsit*, and the notes, *ante*, 79, 80, 81. and the precedent and notes in 2 Saund. 61. and 62. Id. 127, 128. 1 Saund. 163, 164. When the submission was by bonds, and the award is merely to pay money, the plaintiff may either declare on the defendant's bond, without stating the condition, as in 1 Saund. 168. or may set out the bond and condition, and the award and breach; or he may declare upon the award itself, as in the above precedent; in which latter case a mutual submission must be stated, though the mode of submission, as whether in writing or not, needs not be shewn, 2 Saund. 61. h. n. 2. 62. b. n. 5. when

the demand is merely for money due on the award, it is in general more advisable to declare on the award as above than on the bond, in order to avoid the delay and expense of a writ of inquiry, which is necessary when the action is on the bond, and the defendant suffers judgment by default, 6 East, 613. But in order to maintain debt on the award, it is necessary that the whole of the money thereby directed to be paid be due. And that the cause of action be merely for non-payment of money, and not for the non-performance of any other act, 1 H. Bl. 547. 2 Saund. 62. n. 5. In the latter cases the declaration must be on the bond.

(u) Set out the substance of the condition.

them as should desire the same on or before, &c. And the said *A B* further saith, that the said *E F* having taken upon himself the burden of the said arbitration, did in due manner and within the time for that purpose appointed, to wit, on, &c. at, &c. duly make and publish his award in writing,^(x) of and concerning the said matters in difference between the said parties, ready to be delivered to the said parties in difference, or such of them as should desire the same, and bearing date, &c. and did thereby award and direct^(y) that the said *C D* should pay to the said *A B*, for, &c. [*set out the award so far as relates to the payment of the money,*] which, when paid, should be in full satisfaction of all claims and demands of him the said *A B* upon or against the said *C D*, for or in respect of the said matters in difference: and the said *E F* did thereby further award and direct, that the said *A B* should pay forty guineas as and for the costs of that his award, and that the said *C D* should upon demand repay to the said *A B*, or to —, his solicitor, one moiety of such sum of forty guineas, and that in all other respects the said parties respectively should bear their own costs of that reference. As by the said award, reference being thereunto had, will more fully appear, of which said award the said *C D* afterwards, to wit, on, &c. at, &c. had notice.^(z) And although the said *C D* did afterwards, to wit, on, &c. pay to the said *A B* the said sum of —*l.* in the said award mentioned; yet the said *C D* did not on the said day, in the said award in that behalf mentioned, pay to the said *A B* the said sum of —*l.* in the said award mentioned, or any part thereof, nor hath he since paid the same or any part thereof, although to pay the said last-mentioned sum of money the said *C D* was requested by the said *A B*, to wit, on, &c. appointed to the payment of the said sum of —*l.* to wit, at, &c. aforesaid, whereby an action hath accrued to the said *A B*, to demand and have of and from the said *C D* the said sum of —*l.* parcel of the said sum above demanded. [*Add counts for money paid—and on an account stated in debt—and common conclusion, ut ante, 144.*]

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(x) As to this allegation, see 2 plaintiff to his action, 2 Saund. 62. b. Saund. 62. b. n. 5. *Ante*, 81. n. (r). n. 5. *Ante*, 81. n. (t).

(y) It is sufficient to shew so much of the award only as to entitle the (z) See *ante*, 81. n. (u).

For Escapes.
2. Against a
sheriff for the
escape of a
prisoner in his
custody, by
virtue of a *capias ad satisfaciendum*.(a)

For that whereas the said *A B* heretofore, to wit, in ——— term, in the ——— year of the reign of our lord the now king, in the court of our said lord the king, before the king himself, (or if the judgment were in *C. P.* say, “in the court of our said lord the king, before the Right Honourable Sir James Manxfield, Knight, and his companions, then his said Majesty’s Justices of the Bench at Westminster in the county of Middlesex,) by the consideration and judgment of the same court, recovered(b) against one *E F*, a certain debt(c) of —*l.* and also —*l.* costs, which in and by the same court were adjudged to the said *A B*, and with his assent for his damages, which he had sustained as *well by occasion of the detaining of the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said *E F* was convicted, as by the record and proceedings thereof, still remaining in the same court of our said lord the king, of the Bench aforesaid, at Westminster aforesaid, will more fully appear; and the said *A B* further saith, that he the said *A B*, for having execution of the said judgment, afterwards, to wit, on, &c.(d) in the ——— year of the reign of our said lord the king, sued and prosecuted out of the said court of our said lord the king, at the Bench aforesaid, at Westminster aforesaid, a certain writ of our said lord the king, called a *capias ad satisfaciendum*, upon the said judgment against the said *E F*, directed to the sheriff of *Essex*, by which said writ our said lord the king commanded the said sheriff that he should take the said *E F* if he should be found in his bailiwick, and him safely keep, so that the said sheriff might have his body before our said lord

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(a) See the precedents referred to in 1 Saund. 37. n. 1. 7 Wentw. 503 to 507. and Com. Dig. Pleader, 2 W. 11: At common law, case was the only remedy against a sheriff for an escape of a prisoner in execution on final process, and that form of action must still be adopted when the escape is before final process, 2 Inst. 382. But the statutes, Westminster, 2. and 1 Rich. II. c. 12. give the action of debt against the sheriff or gaoler for an escape, to recover the sum for which a prisoner was charged in execution — and to which action of debt the statute of limitations cannot be pleaded,

1 Saund. 37. and 38. n. 2. 2 Saund. 67. n. 10. When the sheriff has neglected to take the defendant in execution, the plaintiff should declare in case, in one count as for an escape, and in another for not taking the defendant.

(b) The judgment must be stated, 1 Saund. 37. but this concise mode of stating the recovery is sufficient. 1 Saund. 39. n. 4.

(c) If the judgment was in assumption, see the next precedent.

(d) The *teste* of the *capias ad satisfaciendum*. The writ whether a *testatum* or *non-omittas ca. &c.* is to be set out *verbatim*.

the king, at *Westminster*, on — next after —, (or if in *For Escapes*. *C. P.* say, "before his said Majesty's Justices at *Westminster*, on — next following,") to satisfy the said *A B* the debt and damages aforesaid, (or if in *assumpsit*, say, "the damages aforesaid,") in form aforesaid recovered; and that the said sheriff of *Essex* should have there that writ, which said writ afterwards and before the delivery thereof to the said sheriff of *Essex*, to be executed as is hereafter mentioned, was duly indorsed, with a direction to the said sheriff, requiring him to levy —*l.* besides sheriff's poundage, officer's fees, and all other incidental expenses. And which said writ so indorsed as aforesaid, afterwards and before the said return thereof, to wit, on, &c.(c) at, &c. was delivered to the said *C D*, who then and from thenceforth, until and at, and after the return of the said writ, was *sheriff of *Essex* aforesaid, to be executed in due form of law; by virtue of which said writ, and of the said indorsement so made thereon as aforesaid, the said *C D* so being sheriff of *Essex*, as aforesaid, afterwards, and before the said return of the said writ, to wit, on, &c. last aforesaid, and within the bailiwick of the said sheriff of *Essex*, to wit, at, &c. aforesaid, took and arrested the said *E F* by his body, and then and there by virtue of the said writ, and of the said indorsement, so made thereon as aforesaid, had and detained him in his custody, in execution for the said sum of —*l.* so indorsed on the said writ as aforesaid, besides sheriff's poundage, officer's fees, and all other incidental expenses, and kept and detained him in his custody, from thence until the said *C D*, so being sheriff of *Essex* as aforesaid, afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, without the leave or license, and against the will of the said *A B*, suffered and permitted the said *E F* to escape and go at large, and the said *E F* did then and there escape, and go at large wheresoever he would, out of the custody of him the said *C D*, (he the said *C D* so then being sheriff of *Essex* as aforesaid; and the said sum of —*l.* so indorsed on the said writ as aforesaid, being then and still wholly unpaid and unsatisfied to the said *A B*, to wit, at, &c. aforesaid, whereby an action hath accrued

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(c) Any day about the time when the writ was delivered to the sheriff.

For Escapes. to the said *A B*, to demand and have of and from the said *C D* the sum of —*l.* above demanded.) Yet, &c. (*Conclusion as ante*, 144.)

3. Against the marshal of K. B. for the escape of a prisoner committed to his custody in execution. (f)

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—, (to wit.) *A B* complains of *C D*, Esq. marshal of the marshalsea of our lord the now king, before the king himself, present here in court in his own *person, of a plea that he render to the said *A B* the sum of —*l.* of good and lawful money of *Great Britain*, which he owes to and unjustly detains from him. For that whereas the said *A B*, heretofore, to wit, in — term, in the — year of the reign of our lord the now king, in the court of our said lord the king, before the king himself, the said court being then holden at *Westminster*, in the county of *Middlesex*, by bill without the writ of our said lord the king, and by the consideration and judgment of the same court, recovered against one *E F*, —*l.* which were adjudged to the said *A B* in and by the said court of our said lord the king, before the king himself, for his damages, [*or if in debt, see the last precedent,*] by him sustained, as well on occasion of the not performing certain promises and undertakings before then made by the said *E F* unto the said *A B*, as for his costs and charges by him the said *A B* about his suit in that behalf expended, whereof the said *E F* was convicted, as by the record and proceedings thereof still remaining in the said court of our said lord the king, before the king himself, at *Westminster* aforesaid, more fully and at large appears. And thereupon (g) on — next after —, in — term, in the — year of the reign aforesaid, the said *E F* then being personally present in the said court of our said lord the now king, before the king himself, at *Westminster* aforesaid, was then and there, in and by the said court of our said lord the king, before the king himself, at the prayer of the said *A B*,

(f) See the notes to the last precedent which are here applicable. If the bill against the marshal be filed in the vacation, as is frequent, there should be a special memorandum, similar to that against an attorney, when filed in vacation. See 5 T. R. 325. 2 Saund. 1. n. 1. As to the

marshal's liability, and the necessity in some cases for filing the bill, whilst the prisoner is out of the rules, see 2 T. R. 129.

(g) This is to be according to the language of the entry of the commitment, for which see Tidd's Præc. Forms, 131, 132.

committed to the custody of the said *C D* then being marshal of the marshalsea of our said lord the king before the king himself, in execution for the damages aforesaid, there to remain until he should satisfy the said *A B* the said damages as by the record of the commitment remaining in the said court of our said lord the king, before the king himself, at *Westminster* aforesaid, more fully appears.^(h) *By virtue of which said commitment the said *C D*, so being such marshal as aforesaid, kept and detained the said *E F* in his custody, in execution for the damages aforesaid, at the suit of the said *A B*, until the said *C D*, so being such marshal as aforesaid, not regarding the duty of his said office as marshal of the said marshalsea as aforesaid, on, &c. at, &c. freely and voluntarily suffered and permitted the said *E F* to escape and go at large out of the said prison and out of the said custody of the said *C D* wheresoever the said *E F* would, without restraint, and without the license, and against the will of the said *A B*, he the said *A B* then and still being wholly unpaid and unsatisfied, his said damages and every part thereof, and the said judgment then and still being in full force and effect, wholly unpaid and unsatisfied, by reason whereof an action hath accrued to the said *A B* to demand and have of and from the said *C D* the said sum of —*l.* above demanded. Yet, &c. (*Conclusion in debt, as ante, 144. and praying relief, &c.*)

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IV. ON SPECIALTIES.

1. ON BONDS GENERALLY.⁽ⁱ⁾

[Commencement as ante, 141.]

For that whereas the said *C D* heretofore, to wit, on, &c. at, &c. by his certain writing obligatory, sealed with his seal, and now shewn to the court of our said lord the king, before the king

4. On a money bond in K. B. Profert.

^(h) As to the necessity for this allegation, see 2 Stra. 1296. 1 Saund. 29. n. 4. 5 East, 440.

⁽ⁱ⁾ As to the declaration on bonds in general, see Com. Dig. Pleadings, 2 W. 9.

1. On bonds *himself here, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound unto the said* generally.

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A B in the said sum of —*l.* above demanded, to be paid to the said *A B*, when he the said *C D* should be thereunto afterwards requested.† Yet the said *C D* although often requested so to do, hath *not as yet paid the said sum of —*l.* above demanded, or any part thereof, to the said *A B*, but to pay the same or any part thereof to the said *A B*, he the said *C D* hath hitherto wholly refused, and still refuses so to do. To the damage of the said *A B* of 10*l.* and therefore brings his suit.

Pledges, &c.

5. The like in C. P.

[Commencement as ante, in C. P. 3, 4. 141.] For that where-
* as the said *C D* heretofore, to wit, on, &c. [The statement of the bond is the same as in *K. B.* omitting the profer, as above, in italics, and concluding as usual in C. P. and subscribing the following profer:] “ And the said *A B* brings here into court the said writing obligatory, sealed as aforesaid, which gives sufficient evidence to the said court here of the debt aforesaid, in form aforesaid, the date whereof is the day and year in that behalf above mentioned.”

6. The like in exchequer.

[Commencement as ante, 4.] Same as in *K. B.* inserting, instead of the words in italics, the following profer: “ and now shewn to the barons of his majesty’s exchequer here, the date whereof is the day and year aforesaid,” and concluding as usual in the exchequer, ante, 4.

7. Counts on several bonds, &c.

Several counts on different bonds may be joined in the same declaration, see the precedent, 1 Saund. 288. and id. note 1. and Lil. Ent. 167. Com. Dig. tit. Pleader, 2 W. 9. In this case proceed as in the first count above, 151. to the obelisk, and then insert the count on the other bonds, as follows:—“ And whereas also, the said *C D* heretofore, to wit, on, &c. at, &c. by his certain other writing obligatory, sealed, &c. [same as the first count, ante, 151. to the end, and then state,] which said several sums of money in the said — counts mentioned, amount together to the said sum of —*l.* above demanded. Yet the said *C D*, &c. [proceed with the breach as above, to the end. There appears to be no occasion to conclude each count with the words,

"whereby," &c. See the precedent, 1 Saund. 288. and ante, I. On bonds generally. 142. n. (i).]

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8. Excuses for proferit.

* As to the proferit, see vol. 1. Index, tit. Proferit. If a bond or other deed be pleaded with a proferit, and the defendant *pl. ad non est factum*, and the plaintiff cannot produce the bond. &c. at the trial, he will be nonsuited, 4 East. 585. It is therefore frequently necessary or advisable, instead of the proferit in the above precedents, to insert in the declaration one of the following excuses, which are to be framed according to the fact, or at least to add a second count containing such excuse. These excuses of the proferit run as follows—If the bond be lost—"and which said writing obligatory having been destroyed by accident;" or "by fire;" or "by the said C D," the said A B cannot produce the same to the said court here. See 3 T. R. 151. If the bond be in the possession of the defendant, the excuse of proferit runs thus, "and which said writing obligatory being in the possession of the said C D, the said A B cannot produce the same to the said court here."

II. ON BONDS STATING THE CONDITION.

It is now settled that in debt on bond, with a condition for the performance of any thing, except the payment of a gross sum of money, or the appearance of the defendant in a bail-bond, 2 B. & P. 446. or a petitioning creditor's bond, 3 East, 22. the plaintiff is bound to suggest breaches in pursuance of the stat. 8 and 9. W. III. c. 11. s. 8. which statute has been decided to extend to an annuity bond, 8 T. R. 126. an arbitration bond, 6 East, 613. and to a bond conditioned for the payment of money by instalments, 6 East, 550. Many of the decisions on this statute are collected in Tidd's Practice, 508 to 512. 1 Saund. 58, n. 1. 2 Saund. 187. n. 2. It appears from the two last references, that it is in general advisable in declarations on bonds within the statute, to set forth the condition of the bond, and the breaches thereof, as in the following precedents.

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II. On bond^h stating condition.

9. On a hasty bond.

[*Same as the precedent, ante, 151. to the obelisk, (k) and then proceed as follows :] Which said writing obligatory, was and is subject to a certain condition thereunder written, whereby, after reciting to the effect following, to wit, that, &c. [set out the whole of the recitals and the condition in the past tense, which is in general, first, to pay a weekly sum for the maintaining of the child, and, secondly, to indemnify the parish, and then proceed as follows :]—(l) and although the said child, whereof the said C D, so was the reputed father as aforesaid, is still living, to wit, at, &c. aforesaid. Yet the said C D hath not from the time of the making of the said writing obligatory, weekly, &c. paid, &c. [state the non-payment of the weekly sum in the negative of the words in the condition, and proceed as follows :] but the said C D hath hitherto wholly neglected and refused, and still neglects and refuses so to do. And by means thereof, the said A B, after the making of the said writing obligatory, and whilst he was churchwarden and overseer, as aforesaid, to wit, on, &c. and on divers other times and days afterwards, was forced and obliged to, and did necessarily lay out and expend divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of —l. in and about the maintenance and education of the said child, to wit, at, &c. aforesaid. And the said A B for assigning a further breach of the said condition of the said writing obligatory, according to the form of the statute(m) in such case made and provided, *further says, that a certain person, to wit, E F, the successor of the said A B, as such churchwarden and overseer as aforesaid, after the making of the said writing obligatory, to wit,

Second breach.

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(k) A profer or an excuse for the omission of it, is as necessary in this, as in a common declaration, 2 Saund. 187. c. 3rd ed. 153. and the defendant cannot plead *nil debet*. 2 Saund. 187. a. n. 2.

(l) If the bond were given before the birth of the child, the following averment should be here introduced, "and the said A B in fact saith, that after the making of the said writing obligatory, to wit, on, &c. at, &c. the child with which the said E F was so

pregnant, and whereof the said C D was such reputed father as aforesaid, was born and still is living, to wit, at, &c. aforesaid."

(m) 8 and 9 W. III. c. 11. s. 8. Before this statute, the plaintiff could only assign one breach of the condition, and if he assigned two or more, the declaration was demurrable to for duplicates, 1 Saund. 58. n. 1. It is not, however, necessary in assigning the breach, to refer to the statute.

on, &c.(n) and on divers other days and times, between that day and the day of exhibiting the bill of the said *A B* in that behalf, was forced and obliged to and did necessarily lay out and expend divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of —*l.* in and about the maintenance and education of the said child, to wit, at, &c. aforesaid, by means of which said premises, the said *A B* hath sustained damages to a large amount, to wit, to the amount of —*l.*(o) and thereby an action hath accrued to him the said *A B*, to demand and have of and from the said *C D*, the said sum of —*l.*(p) above demanded. Yet the said *C D* (although often requested so to do) hath not as yet paid the said sum of —*l.* above demanded, or any part thereof to the said *A B*, but to pay the same to him, hath hitherto wholly refused and still doth refuse. To the damage of the said *A B* of —*l.*(q) and therefore he brings his suit, &c.

II. On bonds stating condition.

Pledges.

[Set out the bond and condition as directed in the last precedent, and then proceed as follows :]—Nevertheless the said *A B* in fact saith, that after the making of the said writing obligatory.(r) to wit, on, &c. at, &c., aforesaid, a large sum of money, to wit, the sum of —*l.* of the said annuity, or yearly sum of —*l.* for one quarter of a year then elapsed, became and was due and owing from the said *C D* to the said *A B*, and still is in arrear and unpaid, contrary to the form and effect of the said writing obligatory, and of the said condition thereof, whereby an action hath accrued to the said *A B*, to demand and have of and from the said *C D* the said sum of —*l.* (the penalty) above demanded. Yet the said *C D* (although often requested so to do) hath not as yet paid the said sum of —*l.*

10. On an annuity bond.

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(n) The day the next overseer came into office.

(o) The amount of the penalty of the bond.

(p) The penalty as to this conclusion, see 2 Saund. 187. c.

(q) The sum here inserted should be the amount of the penalty, or upwards.

(r) If the annuity be payable during the life of a third person, here insert the following allegation: "And during the life of the said *E F*," which will be a sufficient averment of the life of the third person, 1 Saund. 235. n. §.

II. On bonds stating condition. above demanded, or any part thereof to the said *A B*, but to pay the same, or any part thereof, hath hitherto wholly neglected and refused, and still neglects and refuses so to do, to wit, at, &c. aforesaid. To the damage, &c.

11. On a bond to replace stock and pay dividends. [Set out the bond and condition as directed, ante, 154. and then proceed as follows:] Yet the said *A B* in fact saith, that the said *C D* hath not at his own proper costs and charges, transferred, or caused, or procured to be transferred unto, or to the account of him the said *A B*, in the books of the said governor and company of the Bank of England, the said sum of —*l.* share or interest in the said joint stock of —*l.* per cent. consolidated bank annuities, but hath hitherto wholly neglected and refused so to do, and the same sum of —*l.* share & interest in the said joint stock, wholly remains untransferred, and unpaid, and unsatisfied to the said *A B*, to wit, at, &c. aforesaid. And for assigning a further breach of the said condition of the said writing obligatory, the said *A B*, according to the form of the statute in such case made and provided, saith, that the said *C D* hath not as yet answered, paid, or made good to the said *A B* all dividends, interest and produce, which he the said *A B* could have received, and would have been entitled to, in case the said —*l.* so remaining, untransferred, and unpaid, and unsatisfied as aforesaid, had remained and continued standing in the books of the said governor and company of the Bank of England, in the names and as the property of him the said *A B*, but on the contrary thereof, although he the said *A B*, after the making of the said writing obligatory, to wit, on, &c. at, &c. aforesaid, could have received, and would have been *entitled unto certain dividends, interest and produce to a large amount, to wit, the sum of —*l.* in case the said sum of —*l.* had remained and continued standing in the books of the said governor and company of the Bank of England, in the name and as the property of him the said *A B* as aforesaid, whereof the said *C D* afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid had notice. Yet the said *A B* in fact saith, that the said *C D* hath not (although often requested so to do) as yet transferred, paid, or made good unto the said *A B*, the said last-mentioned sum of money, or any part thereof, but hath hitherto wholly neglected and refused so to do, and still neglects and

Second
breach.

refuses so to do, to wit, at, &c. aforesaid. To the damage of the said *A B* of —*J.* whereby an action hath accrued to the said *A B* to demand and have of and from the said *C D* the said sum of —*J.* above demanded. Yet the said *C D* hath not, although often requested so to do, as yet paid the said sum of —*J.* above demanded, or any part thereof, to the said *A B*, but hath hitherto wholly neglected and refused, and still neglects and refuses to pay the same or any part thereof to the said *A B*. To the damage of the said *A B* of —*J.*(*s*) and therefore he brings his suit, &c.

11. On bonds stating condition.

III. ON BONDS RELATING TO THE CHARACTER IN WHICH THE PLAINTIFF SUES, OR THE DEFENDANT IS SUED.

The following forms at the suit of an executor, or of an administrator, will suffice to shew the mode in which a declaration on bond, by or against husband and wife, surviving obligors or obligees, assignees, executors or administrators, *are to be framed. The forms in by *assumpsit* and against particular persons, *ante*, 45 to 70. may readily be applied to declarations on bonds.

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—, (to wit.) *A B*, executor of the last will and testament of *E F*, deceased, complains of *C D* of a plea that he render to him the sum of —*J.* of lawful money of *Great Britain*, which the said *C D* unjustly *detains*(*u*) from him. For that whereas the said *C D*, on, &c. at, &c. by his certain writing obligatory, sealed with his seal, and now shewn to the court of our said lord the king, before the king himself here, the date whereof is the same day and year aforesaid, acknowledged himself to be held and firmly bound to the said *E F*, in his life-time, in the said sum of —*J.* above demanded, to be paid to the said *E F* or his certain attorney, executors, administrators or assigns, when he the said *C D* should be thereunto after-

12. Executor of obligee against obligor.
(*t*)

(*s*) *Ante*, 155. n. (*g*).

(*u*) As to the *debet et detinet*, see

(*t*) See a form against executors in *ante*, 141. n. (*f*).

C. P. 2 Sess. 216.

By and against executors, &c.
Breach.

wards requested. Yet the said *C D* (although often requested so to do,) hath not as yet paid the said sum of —*l.* above demanded, or any part thereof to the said *E F*, in his life-time, or to the said *A B*, executor as aforesaid, since the death of the said *E F*, but to pay the same, or any part thereof to the said *E F*, in his life-time, or to the said *A B*, executor as aforesaid, since the death of the said *E F*, the said *C D* hath hitherto wholly refused, and still doth refuse to pay the same, or any part thereof to the said *A B*, executor as aforesaid. To the damage of the said *A B*, as executor as aforesaid, of —*l.* and therefore he brings his suit, &c. and the said *A B* brings into court here the letters testamentary of the said *E F*, deceased, whereby it fully appears to the said court here, that the said *A B* is executor of the last will and testament of the said *E F*, deceased, and hath the execution thereof, &c.

Pledges, &c.

13. By an administrator in K. B.

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Breach.

—, (to wit.) *A B*, administrator of all and singular the goods, chattels and credits, which were of *E F*, deceased, *at the time of his death, who died intestate, complains of *C D* being, &c. of a plea that he render to the said *A B* —*l.* which he unjustly *detains* from him. For that whereas, &c. [*State the making of the bond, &c. as in the last precedent, and conclude as follows:*] Nevertheless the said *C D* (although often requested so to do) hath not as yet paid the said sum of —*l.* to the said *E F*, in his life-time, or to the said *A B* since the decease of the said *E F*, (to which said *A B*, after the death of the said *E F*, to wit, on, &c. at, &c. aforesaid, administration of all and singular the goods, chattels and credits, which were of the said *E F*, deceased, at the time of his death, who died intestate, by *Charles*, by Divine Providence, archbishop of *Canterbury*, primate of all *England*, and metropolitan, in due form of law was granted,) but he so to do hath hitherto wholly refused, and still refuses to pay the same, or any part thereof to the said *A B*, administrator as aforesaid. To the damage of the said *A B*, as administrator as aforesaid, of —*l.* and therefore he brings his suit, &c. And the said *A B* brings into court here the letters of administration, of the said archbishop, ("or Bishop," &c.) which give sufficient evidence to the said court here, of the grant of administration to the said *A B*, as aforesaid, the

date whereof is the day and year in that behalf, above mentioned, &c. *By and against executors, &c.*

Pledges, &c.

—(x) *A B* complains of *C D*, heir of *E F*, (y) *deceased, being in the custody of the marshal of the marshalsea, of our lord the now king, before the king himself, of a plea that he render to him the said *A B* the sum of —*l.* of good and lawful money of Great Britain, which he owes to (z) and unjustly detains from him. For that whereas the said *E F* in his life-time, whose heir the said *C D* is, to wit, on, &c. at, &c. by his certain writing obligatory, sealed with his seal, and now shewn, &c. [state the profert or excuse as ante, 151. 153.] acknowledged himself to be held and firmly bound to the said *A B* in the said sum of —*l.* above demanded, to be paid to the said *A B* whenever he the said *E F* should be thereunto afterwards requested, for which payment to be well and truly made, he the said

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14. Against an heir, on the bond of his ancestor. (w)

(w) See the precedents, 7 Wentw. Index, as to the liability of an heir, and the declaration in general against him, see the valuable note, 2 Saund. 7. n. 4. Com. Dig. Pleading, 2 E. 2. Vin. Abr. tit. Heir, K. 2 Bac. Abr. Heir and Ancestor. Plowd. 439, 440. He is not chargeable unless he be expressly named in the deed. Com. Dig. Pleading, 2 E. 2. Vin. Abr. Heir, K. 2. or have legal assets by descent from the obligor. A reversion is assets, but an equity of redemption is not, id. ibid. Com. Dig. Assets, A. & B. Barnes, 164. In the latter case, the obligee must proceed in equity, 2 Saund. 7. n. 4.

(x) As to the venue, see Vin. Abr. Heir, K. 2. Hob. 37. it appears to be transitory.

(y) The defendant must be described as heir, and in the old precedents he is so described in the body of the declaration, as well as in the commencement,

ment, see Rast. Ent. 172. In general it needs not be shewn how he became heir, whether as son, grandson, &c. that matter not lying in the plaintiff's knowledge, 2 Saund. 7. n. 4. Com. Dig. Pleading, 2 E. 2. 1 Salk. 355. Vin. Abr. Heir, K. 2. but if the action be against the heir of an heir of the obligor, the declaration must state that fact specially, for if the declaration were against him as heir generally to the obligor, and the defendant should plead *riens per descent*, the plaintiff would fail, Cro. Car. 151. 2 Saund. 7. n. 4. Vin. Abr. tit. Heir, K. 2. pl. 16. It needs not be averred that the defendant had assets by descent, Dyer, 344. b.

(z) The declaration must be in the debt and detinet, Com. Dig. Pleading, 2 E. 2. Vin. Abr. K. 2. but the omission of the debt will be aided by verdict, id. ibid. 3 East, 2. 2 Saund. 7. n. 4.

Against heirs, &c. *E F* bound himself and his heirs (a) firmly by the said writing obligatory. Nevertheless, the said *E F*, in his life-time, and the said *C D*, since the death of the said *E F*, (although often requested so to do,) have not, nor hath either of them as yet paid the said sum of —l. or any part thereof to the said *A B*, but the said *E F* in his life-time, and the said *C D* since his decease, have hitherto wholly refused, and the said *C D* still wholly refuses so to do. To the damage, &c.

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fs. Against an heir and the devisee of the obligor. (b)

* —, *A B* complains of *C D* and *E F*, which said *C D* is heir of *G H*, deceased, and which said *E F* is devisee of the said *G H*, of divers lands and tenements of the said *G H*, deceased, by his last will and testament, being in the custody, &c. of a plea that they render him the said *A B* —l. of lawful, &c. which they owe to and unjustly detain from him. For that whereas the said *G H*, of whom the said *C D* is heir, and the said *E F* is devisee as aforesaid, in his life-time, to wit, on, &c. at, &c. by his certain writing obligatory, sealed with his seal, and to the court, &c. (*proferretur ante*, 151.) acknowledged himself to be held and firmly bound unto the said *A B*, in the said sum of —l. above demanded to be paid to the said *A B* when he the said *G H* should be thereunto requested, and for which payment well and truly to be made, the said *G H* did by the said writing obligatory, bind himself and his heirs to the said *A B*. Nevertheless, the said *G H*, in his life-time, and the said *C D*, his heir, and the said *E F*, devisee as aforesaid, (although often requested so to do,) have not, nor hath either of

(a) It must be shewn in the declaration that the heir was expressly bound, for otherwise he is not chargeable, Com. Dig. Pleader, 2 E. 2. Vin. Abr. tit. Heir, K. 2. 2 Saund. 184. n. 1. 136. &c.

(b) See the precedents, Clift. Ent. 243. pl. 19. Lill. Ent. 145. Id. 529, 530. 2 Rich. C. P. 241. 5 Wentw. 374. Index, vol. 7. 539. 2 Mall. Ent. 186, 187. In some of the precedents, the date and substance of the will, and that the obligor died seised, are stated, see 2 Mall. Ent. 186, 187. 2 Rich. C. P. 241. Lill.

Ent. 145. 529, 530. but in others, these facts are not stated, see Clift. Ent. 243. 5 Wentw. 374. see vol. 18. MSS. 35. where the declaration was holden good on demurrer, and this according to the principle in 1 Salk. 355. 2 Saund. 7. n. 4. seems sufficient. The liability of the devisee depends on statute 3 W. & M. c. 14. see the constructions of this statute, 2 Saund. 7. n. 4. Bac. Abr. Heir. Vin. Abr. Heir, Z. d. The devisee must be sued jointly with the heir in equity, as well as at law, *id. ibid.*

them, as yet paid the said sum of —*l.* above demanded, or any part thereof to the said *A B*, but to pay the same to the said *A B* have wholly neglected and refused, and the said *C D* and *E F* still neglect and refuse to pay the same, or any part thereof to the said *A B*. To the damage, &c.

* *Markham and Le Blanc*.(c)

———— next after ————, (d) in
Hilary Term, 47 Geo. III.

* 162

—, (to wit.) (c) *A B*, assignee of *E F*, Esq. sheriff (f) of the county of —, according to the form of the statute (g) in such case made and provided, complains of *C D* being in the custody, &c. of a plea that he render to the said *A B*, as assignee as aforesaid, the sum of —*l.* (the penalty) of lawful money of Great Britain, which he owes to and unjustly detains from him. For that whereas the said *A B*, on, &c. (h) in the — year of the reign of our lord the now king, sued and prosecuted out of the court of our said lord the king, before the king himself, the same court then and still being holden (i) at Westminster, in the county of Middlesex, against the said *C D*, [or if the declaration be against one of the bail, say, "against one *G H*,"] a certain writ of our said lord the king, called a *latitat*, directed to the sheriff of —, (or if a bill of Middlesex, say, "a certain precept called a bill of Middlesex, whereby the sheriff

16. On a bail-bond by the assignee against the principal or bail, where the first suit was in K. B., by bill.

The writ.

(c) This action, whether in the name of the sheriff or the assignee of the bond, must be brought in the court, from which the process in the original action issued, 2 Saund. 61. b. 3 T. R. 152. acc. 1 H. Bl. 631. cont.

(d) If the bond was assigned after the first day of term, the declaration must be entitled specially, or will be demurrable, 1 T. R. 116. 7 T. R. 474. Ante, 1. n. (a).

(e) The venue is transitory, Fortes. 366. Stra. 727. Ld. Raym. 1455.

(f) In Middlesex the two officers constitute only one sheriff, and the

declaration would be demurrable if they be described as sheriffs, Bac. Abr. Sheriff, K. 162. 2 Ld. Raym. 1135.

(g) 4 & 5 Ann. c. 16. s. 20. see the constructions thereon in 2 Saund. 59. a. b. n. S. Tidd, 218. 3 Bj. Com. 290.

(h) This may be the teste of the writ, or the day it is actually issued, but the first is preferable, see the next note.

(i) This allegation is unnecessary, and if the writ be stated to be sued out in vacation, would render the declaration demurrable, 5 Burr. 2586. 3 T. R. 184. 1 Saund. 300. b. n. 7.

On bail bonds. *of Middlesex was commanded to take, &c.*) by which said writ, our said lord the king commanded the said sheriff to take the said *C D* if he should be found in his bailiwick, and him safely keep *so that he might have his body before our said lord the king, at *Westminster*, in the county of *Middlesex*, on — next after —, to answer the said *A B* of a plea of trespass, and also to a bill of the said *A B*, against the said *C D* for — upon promises according to the custom of his said majesty's court, before his said majesty to be exhibited, and that the said sheriff should then have there that writ, (or if the arrest was on a bill of *Middlesex*, say, "*precept*.") Which said writ (or "*precept*") afterwards and before the delivery thereof to the said sheriff of the said county of —, to be executed as is hereinafter mentioned, was marked and indorsed for bail for — by virtue of an affidavit(*k*) of the cause of action of the said *A B* in that behalf before then made, and duly affiled of record, in the said court of our said lord the king, before the king himself, according to the form of the statute in such case made and provided,^(l) and which said writ (or "*precept*") so indorsed, afterwards and before the said return thereof, to wit, on, &c.^(m) to wit, at, &c.⁽ⁿ⁾ was delivered to the said *E F*, who then and from thence, until and at, and after the said return of the said writ, (or "*precept*,") was sheriff of the said county of —, in due form of law to be executed. By virtue of which said writ (or "*precept*,") the said *E F*, so being sheriff as aforesaid, afterwards and before the said return of the said writ, (or "*precept*,") to wit, on, &c. last aforesaid, and within his bailiwick as such sheriff. to wit, at, &c. aforesaid,^(o) took and arrested the said *C D* by his body,^(p) and then and there had and detained him in his custody, as such sheriff, at the suit of the said *A B* for *the

Indorsement
for bail.

Delivery to
the sheriff.

The arrest.

* 164

(k) It is not necessary to aver that it was by virtue of an affidavit, and if the averment be introduced, though unnecessarily, the affidavit must in some cases be produced in evidence, 1 B. & P. 280, 1 Burr. 530. It is, therefore, in general advisable, merely to state the indorsement for bail, without referring to the affidavit.

(l) 12 Geo. I. c. 29.

(m) This day is not material: it is usual to insert the date of the bail-bond.

(n) The venue in the action.

(o) The venue.

(p) This allegation is unnecessary, and is not traversable, 2 Saund. 59. b.

cause aforesaid. And the said *C D* being so arrested, and in custody of the said *E F* so being sheriff as aforesaid, by virtue of the said writ, (or "*precept*,") at the suit of the said *A B*, the said *C D* afterwards and before (g) the said return of the said writ, to wit, on, &c. last aforesaid, (r) and within his bailiwick, as such sheriff, to wit, at, &c. aforesaid, (s) took bail for the appearance of the said *C D*, at the return of the said writ, (or "*precept*,") according to the form of the statute in such case made and provided, (t) and on that occasion the said *C D*, (or if the action be against one of the bail, the said *C D*, as bail and surety for the said *G H*.) then and there, to wit, on, &c. last aforesaid, at, &c. aforesaid, by his certain writing obligatory, commonly called a bail-bond, sealed with the seal of the said *C D*, and now shewn to the court of our said lord the king, before the king himself here, the date whereof is the same day and year last aforesaid, acknowledged himself to be held and firmly bound to the said *E F* so then being sheriff of the said county of —, as aforesaid, as such sheriff, by the name, description and addition of —, sheriff of the county of —, in the penal sum of —*l.* of good and lawful money of Great Britain, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns, when he the said *C D* should be thereunto afterwards requested, with and under a certain condition thereunder written, that if the said *C D* (or, if against the bail, "if the said *G H*") should appear before our said lord the king, at Westminster, on — next after —, to answer the said *A B* in a plea of trespass, and also to a bill of the said *A B* against the said *C D* for —*l.* upon promises, according to the custom of the said court of our said lord the king, before the king himself to be exhibited, that then the said obligation should be void, otherwise should be, and remain in full force and virtue. As by the said writing obligatory, and the condition thereof, reference being thereunto had, may more fully and at large appear. And the said *A B* in fact saith, that the said *C D* did not appear before

On bail bonds.

The bail bonds.

The condition thereof.

* 164

Breach of contract.

(g) The bond is void if taken after the return day of the writ, 2 Saund. 60. s. 1 *Ld. Raym.* 352.

(r) The date of the bond.

(s) The venue.

(t) 23 H. VI. c. 9. 2 Saund. 59.

61. c. d. 5.

On bail bonds. our said lord the king, at *Westminster*, on — next after —, in the condition of the said writing obligatory mentioned, according to the exigency of the said writ, (or *“precept”*), but therein wholly failed and made default, whereby the said writing obligatory became forfeited; and the said *A B* further saith, that the said writing obligatory being so forfeited, and the money therein specified remaining unpaid and unsatisfied to the said sheriff, he the said *E F*(*u*) so being sheriff of the said county of — as aforesaid, afterwards, to wit, on, &c.(*x*) to wit, at, &c. aforesaid,(*y*) at the request of the said *A B*, the plaintiff in the said suit, by an indorsement* on the said writing obligatory, duly made,(*z*) and attested in the presence of two(*a*) credible witnesses, and sealed with the seal of office of sheriff of the said county of —, assigned the said writing obligatory to the said *A B*, according to the form of the statute in such case made and provided.(*b*) As by the said assignment indorsed on the said writing obligatory as aforesaid, and duly stamped(*c*) before the commencement of this suit, according to the form of the statute in such case made and provided, and to the court of our said lord the king now here shewn,(*d*) the *date whereof is the day and year last aforesaid, may more fully appear. By means whereof, and by force of the statute(*e*) in such case made and provided, an action hath accrued to the said *A B*,(*f*) as assignee of the said *E F*, so being sheriff of the said county of —, as aforesaid, to demand, and have of and from the said *C D* the said sum of — *l.* above demanded. Yet the said *C D* (although often re-

* 166

(*u*) The assignment may be made by the under-sheriff in the name of the sheriff, 2 Saund. 61. a.

(*x*) The date of the assignment being before the title of the declaration, ante, 162. n. (*d*).

(*y*) The venue.

(*z*) It is sufficient to state that the sheriff assigned the bond to the plaintiff according to the statute, without alleging that the assignment was sealed or witnessed, Willes, 408, 409. n.

2 Saund. 61. b. 1 Wils. 121.

(*a*) Id. ibid. It is not necessary to state the names, 1 Wils. 121. if the

assignment appear on the face of the declaration to have been attested only by one witness, it will be demurrable, Willes, 409. n. a.

(*b*) 4 Ann. c. 16.

(*c*) The assignment must be stamped before the action is brought, 4 Ann. c. 16.

(*d*) This profert is unnecessary, 1 Wils. 121.

(*e*) The assignee is entitled to sue by the 4 Ann. c. 16.

(*f*) This must be accurate, 1 B. & P. 58.

requested so to do) hath not as yet paid the said sum of —l. above demanded, or any part thereof to the said *E F* before the said assignment, or to the said *A B*, assignee as aforesaid, or either of them, since the said assignment, but hath hitherto wholly neglected and refused so to do, and still doth neglect and refuse to pay the same, or any part thereof, to the said *A B* assignee as aforesaid. To the damage of the said *A B* as assignee as aforesaid, of —l. and therefore he brings his suit, &c.

On bail bonds.

Pledges, &c.

[Commencement as in the last precedent.]

For that whereas the said *A B* on, &c. sued and prosecuted out of the court of our lord the now king, before the king himself, the same court then and still being holden at *Westminster*, in the county of *Middlesex*, against the said *C D* a certain writ of our said lord the king, called a *special capias ad respondendum*, (or if a *testatum*, &c. according to the fact,) directed to the sheriff of —, by which said writ our said lord the king commanded the said sheriff to take the said *C D*, if he should be found in his bailiwick, and him safely keep, so that he might have his body before our said lord the king, on —, wheresoever our said lord the king should then be in *England*, to answer the said *A B* in a plea of trespass on the case on certain promises and undertakings therein mentioned, to the damage of the said *A B* of —l. as it was said, and that the said sheriff should then have there that writ; which said writ afterwards, and before the delivery thereof to the said sheriff of, &c. [Proceed as in the last precedent, to the end, except in the statement of the condition of the bail-bond, (which is for appearance "wheresoever," &c.) and in the breach thereof.]

17. The like when the proceeding in the first action was by special original. (g)

* 167

(g) Observe the notes to the precedent, ante, 162. which are here in general applicable.

On bail bonds.

In the Common Pleas.

Hilary Term, 47 Geo. III.

18. On a bail-bond in C. P. against the principal or bail. (h)

———, (to wit.) *C D* was summoned to answer *A B*, assignee of *E F*, Esq. sheriff of the county of ———, according to the form of the statute in such case made and provided; of a plea that he render to the said *A B*, as assignee as aforesaid, the sum of ——. of good and lawful money of *Great Britain*, which he owes to and unjustly detains from him; and thereupon the said *A B*, by ———, his attorney, complains that whereas the said *A B* heretofore, to wit, on, &c. sued and prosecuted out of the court of our lord the now king, before the Right Honourable Sir *James Mansfield*, knight, and his companions then his majesty's justices of the bench, at *Westminster*, in the county of *Middlesex*, a certain writ of our said lord the king, called a *capias ad respondendum*, against the said *C D*, directed to the sheriff of ———, by which said writ our said lord the king commanded the said sheriff that he should take the said *C D* if he should be found in his bailiwick, and him safely keep, so that the said sheriff might have his body before the justices of our said lord the king, at *Westminster*, on the Morrow of All-Souls, to answer to the said *A B* in a plea, wherefore with force and arms the close of the said *A B* at ——— he broke, and other wrongs to him did, to the great damage of the said *A B*, and against the peace of our said lord the king, and also that the said *C D* might answer to the said *A B*, according to the custom of his said majesty's court of the bench, on a certain plea of trespass on the case upon promises, to the damage of the said *A B* of ——. as it was said, and that the said sheriff should have there that writ; which said writ afterwards and before the delivery thereof to the said sheriff of, &c. [*Proceed as in the precedent, ante, 162. to the end, except in the statement of the condition of the bail-bond (which is for appearance in C. P.) and in the breach thereof, and conclude as in debt in C. P.*]

* 168

(h) Observe the notes to the precedent, ante, 162. which are here in general applicable.

*Markham and Le Blanc. (l)**On replevin bonds.*

— next after (k) —,
in — Term — Geo. III.

— (to wit,)(l) *A B*, assignee of *E F*, esq. sheriff of the county of —, according to the form of the statute(m) in such case made and provided, complains of *C D* being, &c. of a plea that he render to the said *A B* as assignee as aforesaid, the sum of —l. of lawful, &c. which he owes to and unjustly detains from him, &c. For that whereas heretofore, to wit, on, &c.(n) at, &c.(o) the said *A B*(p) distrained the goods and chattels of one **G H*, hereinafter mentioned, for a certain sum of money then due to the said *A B* for rent. And the said goods and chattels being so distrained, the said *G H*, afterwards, and within the space of five days then next ensuing, to wit, on, &c. at, &c. aforesaid, made his plaint to the said *E F*, then being sheriff of the county of —, out of the county court of the said sheriff, of the taking and unjustly detaining of the goods and chattels of the said *G H* by the said *A B*, and then and there prayed the said sheriff that the said goods and chattels might be forthwith replevied by the said sheriff, and delivered to the said *G H*. And thereupon the said *E F*, so being sheriff of the said county of —, according to the form of the statute in such case made and provided,(q) did take from the said *G H* and from the said *C D*

19. By the assignee of a replevin bond where the proceedings in replevin were removed, by *re. fa. lo.* into K. B. and the plaintiff obtained judgment there. The distress for rent.

* 169

Application to the sheriff to replevy.

The replevin bond taken.

(l) The action may in all cases be in one of the courts at Westminster, 5 T. B. 195. It must when the proceedings in replevin have been removed, be brought in the court in which the *re. fa. lo.* is returnable, as on a bail-bond, 2 Sell. Prac. 267. ante, n. (c).

(*) As to the title, ante, 162. n. (d) 162. and 1 n. (u).

(l) The venue may be laid in any county, ante, 162. n. (c).

(n) The 11 Geo. II. c. 19. s. 23. enables the assignee of the sheriff to sue in his own name. The decisions as to the action on bail-bonds, are in general applicable.

(u) This is generally the day when in fact the distress was made, and corresponding with the proceedings therein.

(o) This should be the parish or place where the distress was made; and if the venue be laid in another county, such venue may be stated after the real place, as follows: "to wit, at," &c.

(p) If a distress were made by the plaintiff, as bailiff of another person, say, "as bailiff of one —, and by his command distrained," &c. 5 T. B. 195.

(q) 11 Geo. II. c. 19. s. 23.

*On replevin
bonds.*

and one *I K*, as two responsible sureties, a bond in double the value of the said goods and chattels so distrained as aforesaid, the value of the said goods and chattels being first ascertained by the oath of a credible witness duly sworn, according to the form of the statute in such case made and provided.^(r) And the said *G H* and the said *C D* and *I K* on the said, &c. at, &c. aforesaid, by their writing obligatory sealed with their respective seals, and now shewn to the court of our said lord the king, before the king himself here, the date whereof is the day and year last aforesaid, did jointly and severally acknowledge themselves to be held and firmly bound unto the said *E F*, so being sheriff of the said county of —, in the said sum of —*l.* above demanded, to be paid to the said sheriff when he the said *G H* and the said *C D* and *I K*, should be

The condition
thereof.

thereunto afterwards requested, with a condition thereunder written, that if the said *G H* did appear at the then next county court for the county of —, to be holden at, &c. in the said county, and should then and there prosecute his action with effect^(s) against the said *A B* for taking and unjustly detaining of his goods and chattels, to wit, &c. [*here state the goods, as mentioned in the condition of the bond,*] and should make return thereof, if return should be adjudged by law,^(s) and should well and truly keep harmless and indemnified^(t) the said sheriff of —, his under-sheriff, deputy and bailiffs, touching and concerning the replevying and delivery of the said goods and chattels, then the said obligation was to be void and of none effect, otherwise to be and remain in full force. And thereupon the said sheriff afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, at the prayer of the said *G H* replevied and made deliverance of the said goods and chattels to the said *G H*, according to the duty of his said office.[†] And afterwards, to wit, at the then next county court for the said county of, &c. to wit, at the county court of the said sheriff, holden at the house known, &c. at, &c. on, &c.

* 170

Replevin
granted.

Plaint in
county court.

(*r*) 11 Geo. II. c. 19. s. 23.

(*s*) The condition of the bond is not satisfied by a prosecution of the suit in the county court, but the plaintiff, if removed by *re. fa. lo.* into a superior court, must be prosecuted

there with effect, and a return made if adjudged *there*, 1 B. & P. 410.

(*t*) *Id. ibid.*

(*u*) As to this part of the condition, see 1 Latw. 567.

before — and —, then suitors of the said court, the said *G H* did appear, and then and there in the same court, without the writ of our said lord the king, levied his plaint against the said *A B*, for the taking and unjustly detaining of the said goods and chattels of the said *G H*, and then and there found pledges, as well for prosecuting his said plaint, as for returning the said goods and chattels, if return thereof should be adjudged by law, to wit, the said *C D* and *I K*.(u) Which said plaint afterwards, to wit, on, &c. was duly removed, at the instance of the said *A B*, from and out of the county court of the said sheriff of —, into the court of our said lord the king, before the king himself, to wit, at *Westminster*, &c. by virtue of his said majesty's writ of *recordari facias loquelam*, before then duly sued and prosecuted *out of the court of our said lord the king, of his chancery at *Westminster* aforesaid, returnable before, &c. on, &c. [*as in the writ of re. fa. lo.*]

On replevin bonds.

Removal by re. fa. h. into K. B.

* 171

And thereupon the said *G H* afterwards, to wit, in — term, in the — year of the reign of our said lord the king, before the king himself, by —, his attorney, declared against the said *A B* in the said plea of taking and unjustly detaining his goods and chattels and by the said declaration, he the said *G H* by the said —, his attorney, complained that the said *A B*, on, &c. aforesaid, at, &c. aforesaid, in a certain street or place there, called —, took the goods and chattels following, to wit, [*here recite the goods as in the declaration,*] and them unjustly detained against sureties and pledges, &c. To the damage of the said *G H* of —. and therefore he brought his suit, &c. And afterwards, to wit, in that same — term, in the — year of the reign, &c. in the said court of our

Declaration in K. B.

Avowry thereto.(x)

(u) These pledges are taken under the statute *Westminster*, 2. 13 Ed. I. c. 2. See *Gilb.* 98. and are not the pledges under the 11 Geo. II. c. 19. s. 23.

(x) It is usual to state the avowry or cognisance, in order to shew that the plaintiff is entitled to sue under the 11 Geo. II. c. 19. s. 23. see 1 B. & P. 378. 5 T. R. 196. but this does not seem necessary, it being sufficiently disclosed in the commence-

ment of the declaration, that the distress was for rent, and that the condition of the bond was to proceed in an action of replevin against the plaintiff or to return the goods to him; see 5 T. R. 195. 197. and 7 Wentw. 21. The declaration on the replevin bond after stating the declaration in replevin, as above, may proceed immediately to the statement of the judgment, omitting the avowry or cognisance.

On replevin
bonds.

said lord the king, before the king himself, (the said court then and still being holden at *Westminster*, in the county of *Middlesex*, the said *A B* by —, his attorney, came and defended the wrong and injury, when, &c. and well avowed the taking of the said goods and chattels in the said declaration mentioned, in a certain messuage or dwelling-house, with the appurtenances, situate and being in, &c. in the said street or place there, called, &c. and justly, &c. because he said that one *L M*, for a long space of time, to wit, for the space of — next before, and ending on —, and from thence until and at the said time when, &c. held and enjoyed the *said messuage or dwelling-house, in which, &c. with the appurtenances, as tenant thereof, to the said *A B* by virtue of a certain demise thereof to the said *L M* theretofore made at and under the yearly rent of —*l.* payable on, &c. in every year, and because —*l.* part of the said sum of —*l.* of the rent aforesaid, for the space of —, ending on, &c. as aforesaid, and from thence until and at the said time when, &c. was due and in arrear from the said *L M* to the said *A B*, the said *A B* well avowed the taking of the said goods and chattels in the said declaration mentioned, in the said messuage or dwelling-house, and justly, &c. as for and in the name of a distress, for the said sum of —*l.* so due and in arrear as aforesaid, and which said sum of —*l.* so due and in arrear to the said *A B*, still remains wholly due and unpaid. And such proceedings were thereupon had in the said plea in the said court of our said lord the king, before the king himself, at *Westminster* aforesaid, that afterwards, to wit, in — term, in the — year of the reign, &c. in the said court of our said lord the king, before the king himself, it was considered and adjudged in and by the same court, that the said *G H* should take nothing by his said plaint,(1) but that he and his pledges to prosecute should be in mercy, &c. and that the said *A B* should go thereof, without day, and have restitution of the said goods and chattels, &c. as by the record and proceedings thereof now remaining in the said court of our said lord the king, before the king himself, at *Westminster* aforesaid, more fully appears.

Judgment for
defendant in
replevin *pro*
retrorsu *ba-*
bendo.

(1) See Com. Dig. Pleader, 3 K. 8. not be inserted for "plaint."
ere, if the word "writ" should

Of all which said several premises the said *G H* afterwards, to wit, on, &c. at, &c. aforesaid, had notice. And the said *A B* in fact, further saith, that the said *G H* did not make a return of the said goods and chattels, or any part thereof, according to the form and effect of the said condition of the said writing obligatory, but hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do. Whereby the said writing obligatory became forfeited to the said *E F*, so being sheriff of the said county of —, as aforesaid. And the same being so forfeited, the said sheriff afterwards, to wit, on, &c. at, &c. aforesaid, at the request of the said *A B*, by an indorsement, &c. [*The statement of the assignment and conclusion of the declaration, are precisely the same as in the precedent, ante, 165. from the obelisk to the end.*]

On replevin bonds.
G H did not return the goods.

Whereby bond forfeited to sheriff, who assigns to plaintiff.

* 173

[*When the declaration is for not prosecuting the action of replevin in the county court, proceed as in the last precedent, to the obelisk 170. and then as follows:*] And although afterwards, to wit, on, &c. the county court of the said sheriff of the said county of —, was duly holden at, &c. aforesaid, before — and —, then suitors of the said court, the same being the next county court of the said sheriff of the said county of —, after the making of the said writing obligatory as aforesaid, to wit, at, &c. aforesaid. Yet the said *G H* did not appear at the said county court, so holden next after the making of the said writing obligatory as aforesaid, and then and there prosecute his said action with effect against the said *A B*, according to the form and effect of the said condition, but wholly omitted and neglected so to do. Whereby the said writing obligatory became forfeited, &c. [*State the forfeiture and the assignment of the bond to the plaintiff, and proceed to the end, as in the last precedent.*]

20. The like when the bond was forfeited, by the replevin suit not being prosecuted in the county court.
(y)

[*Commencement as usual in debt, ante, 141.*]

That whereas the said *A B* heretofore, to wit, on, &c. at, &c. demised to the said *C D*, a certain messuage, land and pre-

21. For rent on a demise.
(z)

(y) See 5 T. R. 195.

doubtful whether the demise were

(z) As to debt on leases, see by deed, it is advisable to declare in vol. 1. Index, tit. Debt. When it is the above form, stating the substance

*On leases,
&c.*

mises, with the appurtenances, situate, &c. to have *to hold the same to the said *C D*, for a certain term of years, to wit, for and during, and until the full end and term of twenty-one years, then next ensuing, and fully to be complete and ended, yielding and paying therefore, during the said term, to the said *A B*, the yearly rent of —*l.* of lawful, &c. at the four most-usual feasts, or days of payment in the year, that is to say, &c. by even and equal portions. By virtue of which said demise; the said *C D* entered into the said demised premises, with the appurtenances, and was possessed thereof from thenceforth; until and upon the feast of *St. Michael* the Archangel, *A D.* 1806, when(a) a large sum of money, to wit, the sum of —*l.* of the rent aforesaid, for the space of — then elapsed, became and was due and payable from the said *C D* to the said *A B*, and still is in arrear and unpaid to the said *A B*, to wit, at, &c. aforesaid. Whereby an action hath accrued(b) to the said *A B*, to demand and have of and from the said *C D*, the said sum of —*l.* parcel of the said sum above demanded.

22. Count for
use and occu-
pation.(c)

And whereas also the said *C D* afterwards, to wit, on, &c. at, &c. aforesaid, was indebted, &c. [*The form of the indebitatus count in debt, will be as ante, 142. and the subject matter of *the debt, for use and occupation, will be as ante, 8. and the conclusion will be as ante, 144.*]

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of the terms of the demise, and adding a count for use and occupation. It is settled that in debt for rent reserved by deed, the plaintiff may declare without stating the deed; (see the precedents and notes in 1 Saund. 276. n. 1. 302. 325. n. 4. Ld. Raym. 1503.) unless in case of a lease of tithes, or other incorporeal hereditaments, 2 Saund. 297. n. 1. This is the only case in which the plaintiff is allowed to declare generally, and to produce a deed in evidence in support of such declaration, 1 New Rep. 104. 109. When the declaration sets out the lease, it is similar to the declaration in covenant for rent, except in the commencement and conclusion, see *post*. To which precedents, with the notes, the reader is referred. See a precedent of debt

on the reddendum of a lease for tithes, 2 Saund. 296. and against an administrator on the reddendum in a lease of lands, 1 Saund. 1, 2. And in debt for rent on the reddendum of a lease to commence in future, 1 Saund. 250, 251. and of debt for a rent charge, or annuity against the persons of the profits, 1 Saund. 276. 292. n. 1. 1 T. R. 578. Doug. 628.

(a) It must be shewn at what time the rent became due, Gilb. Debt, 407.

(b) In Gilb. on Debt, 414. this is said to be incorrect.

(c) This count in debt for use and occupation, is sustainable, 6 F. R. 62. and without stating the local situation of the premises, 6 East. 348. *ante*, 8. n. c.

For that whereas heretofore, to wit, on, &c. at, &c. by a certain indenture then and there made between the said *A B* of the one part, and the said *C D* of the other part, (one part of which said indenture sealed with the seal of the said *C D*, the said *A B* now brings here into court, the date whereof is the day and year aforesaid,) he the said *C D*, for the consideration therein mentioned, did grant, &c. [*here set out the words of the indenture, setting forth the grant of the annuity, and then state the defendant's covenant to pay the annuity in the past tense, and proceed as follows:*] As by the said indenture, reference being thereunto had, will amongst other things, more fully and at large appear. And the said *A B* in fact saith, that after the making of the said indenture, and during the natural life of the said *E F*, to wit, on, &c. at, &c. aforesaid, a large sum of money, to wit, the sum of —*l.* of lawful, &c. of the said annuity or yearly rent charge for one year, and a quarter of a year, then elapsed, became and was due and owing from the said *C D* to the said *A B*, and still is in arrear and unpaid, contrary to the form and effect of the said indenture, and of the said covenant of the said *C D*, so by him in that behalf made as aforesaid, to wit, at, &c. aforesaid. Whereby an action hath accrued to the said *A B* to demand and have of and from the said *C D*, the said sum of —*l.* being the said sum above demanded. Yet, &c. (*Conclusion as ante*, 144.)

On annuity deeds.

23. On an annuity deed for arrears of the annuity. (d)

For that whereas heretofore, to wit, on, &c. at, &c. by *a certain indenture then and there made between the said *A B*

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24. On a mortgage by lease and release for principal and interest. (e)

(d) Debt is preferable to covenant, on an annuity deed, because in debt the judgment is final in the first instance. It is also more advisable to declare in debt on the covenant than on the annuity bond, because in the latter case, damages must be assessed, in pursuance of 8 and 9 W. III. c. 11. s. 8. which causes expense and delay.

(e) In general, it is more advisable to declare in debt than in covenant on a mortgage deed, because in the

former deed, the judgment is final in the first instance, and though by default bail in error are required, Tidd, 1079. Debt on the covenant is also preferable to debt on a mortgage bond, conditioned as well for payment of the money, as performance of covenants in the mortgage deed, because in the latter case the damages must be assessed under the 8 and 9 W. III. c. 11. s. 8. which creates expense and delay.

On mortgage deeds.

of the one part, and the said *CD* of the other part, which said indenture, &c. (*proferri ut ante*, 151.) After reciting as therein is recited, the said *CD* for the considerations therein mentioned, did grant, bargain, sell, alien, release and confirm unto the said *AB*, and to his heirs and assigns, certain messuages, lands, tenements and premises, with the appurtenances therein mentioned and particularly described. (*f*) To have and to hold, &c. (*copy the habendum verbatim*.) subject among other things to a certain proviso or condition, that is to say (*g*) that if the said *CD*, his heirs, executors, or administrators, did and should pay to the said *AB*, his executors, administrators, or assigns, the full sum of —*l.* and lawful interest for the same, of good and lawful money of *Great Britain*, on the — day of — next ensuing the date of the said indenture, then the said indenture should be void. And the said *CD* did thereby, for himself, his heirs, executors and administrators, covenant, promise and agree to and with the said *AB*, his executors, administrators and assigns, that he the said *CD*, his heirs, executors, or administrators, or some, or one of them, should and would, well and truly pay, or cause to be paid unto the said *AB*, his executors, administrators, or assigns, *the said sum of —*l.* and lawful interest for the same, upon the day and time mentioned and appointed for payment thereof, in and by the said proviso, according to the true interest and meaning of the said indenture, as by the said indenture, (reference being thereunto had,) will amongst other things more fully and at large appear. Nevertheless the said *AB* in fact saith, that the said *CD* did not nor would, well and truly pay or cause to be paid unto the said *AB* the said sum of —*l.* and lawful interest for the same on the day and time mentioned and appointed for payment thereof as aforesaid, but therein failed and

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(*f*) The premises ought not to be stated at length, but in this concise way, *Cowp.* 665. 727. 1 *Saund.* 233. n. 2. 2 *Saund.* 366.

(*g*) The proviso is to be copied from the deed *verbatim*, in the past tense. It is not necessary to state the premises, the habendum or the proviso, for as in covenant on a deed

it is sufficient to state the covenant and the breach, and the former may be stated, according to its legal effect, so the declaration in debt on a mortgage deed, may state the covenant to have been to pay the principal and interest on the day mentioned in the proviso, without stating such proviso.

made default, and there is now due and owing from the said *C D* to the said *A B*, for and on account of the said sum of —*l.* and interest thereon, a large sum of money, to wit, the sum of —*l.* of lawful money, &c. above demanded, to wit, at, &c. aforesaid, whereby an action hath accrued to the said *A B* to demand and have of and from the said *C D* the said sum of —*l.* above demanded. Yet, &c. (Common conclusion in debt as *ante*, 144.)

On mortgage deeds.

V. ON RECORDS.

[Commencement as usual in debt, *ante*, 141.] For that whereas the said *C D* heretofore, to wit, in — Term, in the — year of the reign of our lord the now king, came personally into the court of our said lord the king, before the king himself here, the said court then and still being holden at *Westminster*, in the county of *Middlesex*,⁽ⁱ⁾ in his proper person, and then and there became pledge and bail for one *E F*, that if it should happen that the said *E F* should be convicted at the suit of the *said *A B* in a certain plea of trespass on the case upon promises, then depending in the said court by and at the suit of the said *A B* against the said *E F*, then the said *C D* consented and agreed that all such damages, costs and charges as should be adjudged unto the said *A B* in that behalf, should be made of his lands and chattels, and levied to the use of the said *A B* if it should happen that the said *E F* should not pay unto the said *A B* those damages, costs and charges, or render his body on that occasion to the prison of the marshal of the marshalsea, of our lord the king before the king himself.^(k) As by the record of the said recognisance, still remaining in the said court of our said lord the king, before

25. On a recognisance of bail, by bill, in K. B. the original action having been in assumpsit.
(h)

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(A) As to this form, 2 Salk. 564. 2 Ld. Raym. 966. 5 East, 461. In debt on a recognisance of bail, it should be stated in the declaration, at whose suit the defendant became bail, and for what sum, &c. 1 Wils. 284. Willes, 19. n. a. Com. Dig. Pleader, 2 W. 10. see the precedents, 7 Wentw. Index, 549.

(i) The venue is local, and must be laid in the county in which the record is, *ante*, t. vol. I. Index, Venue. Hob. 196. Tidd, 1035.

(k) The description of the recognisance, is to be taken from the entry of the recognisance by bill, with which it should precisely correspond. See Tidd's Prac. Forms, 104.

On recogni-
sances of bail.

the king himself here, to wit, at *Westminster* aforesaid, more fully appears, and although the said *A B* afterwards, that is to say, in, &c. that same Michaelmas Term, in the 47th year aforesaid, in the said court of our said lord the king, before the king himself here, to wit, at *Westminster* aforesaid, in the county of *Middlesex* aforesaid, by bill without the writ of our said lord the king, and by the consideration and judgment of the said court, recovered in the said plea against the said *E F*, —*l.* for his damages which he had sustained, as well on the occasion of not performing certain promises and undertakings, then lately made by the said *E F* to the said *A B*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *E F* is convicted, as by the record and proceedings thereof, still remaining in the said court of our said lord the king, before the king himself here, to wit, at *Westminster* aforesaid, more fully appears. Yet the said *E F* hath not paid to the said *A B* the said damages, costs, and charges, or any part thereof, nor rendered his body on that occasion, to the prison of the marshal of the marshalsea of our said lord the king, before the king himself, according to the form and effect of the said recognisance, and as well the said recognisance as the said judgment still remain in full force and effect, in no wise satisfied, vacated, or discharged. And the said *A B* hath not yet obtained any execution of the said judgment, whereby and according to the form and effect of the said recognisance, an action hath accrued to the said *A B* to demand and have of and from the said *C D*, the said sum of —*l.* in form aforesaid recovered and above demanded. Yet, &c. (Conclusion in debt, *ut ante*, 144.)

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[Commencement as usual in debt, *ante*, 141.]

28. On a recognisance of bail in C. B. against one of the bail. (1)

For that whereas the said *C D* heretofore, to wit, in — Term, in the — year of the reign of our lord the now king, came personally into his majesty's court, before the right ho-

(1) Observe the notes to the last precedent. If taken before a commissioner in the country, or by a judge at chambers. See *Lutw.* 1282. 2 *Salk.* 564. 2 *Ld. Raym.* 966. 5 *East*, 461. See the entries, *Thomp.* 125. 2 *Brownl.* 176. *Brown. Red.* 200. 2 *Wentw. Index*, 549.

nourable Sir *James Mansfield*, knight, and his companions, then his said majesty's justices of the bench here, to wit, at *Westminster*, in the county of *Middlesex*, and then and there in the said court here, acknowledged^(m) himself to owe to the said *A B* the said sum of —*l.* above demanded, which said sum of —*l.* the said *C D* for himself and his heirs, did consent and grant to be made of his lands and chattels, and levied to the use and behoof of the said *A B* upon this condition, that if judgment should happen in the said court here, to be given for the said *A B* against one *E F* in a certain plea of trespass on the case, by the said *A B* against the said *E F* in the said court brought, then that the said *C D* should satisfy *all such damages, which should be adjudged to the said *A B* against the said *E F* in the same court here, in the plea aforesaid, or should render his body on that occasion to the prison of the Fleet: as by the record of the said recognisance remaining in the said court here, at *Westminster* aforesaid, may more fully appear. And whereas also afterwards, to wit, in that said — term, in the — year of the reign aforesaid, judgment was given in the said court, before the said Sir *James Mansfield*, knight, and his companions, then his said majesty's justices of the bench here, to wit, at *Westminster* aforesaid, for the said *A B* against the said *E F* in the plea aforesaid. And the said *A B* then and there, by the consideration and judgment of the same court, recovered in the said plea against the said *E F*, —*l.* which in and by the said court, were adjudged to the said *A B* for his damages which he had sustained, as well by the reason of his non-performance of certain promises and undertakings before then made by the said *E F* to the said *A B*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *E F* was convicted, as by the record and proceedings thereof, still remaining in the said court of the bench here, to wit, at *Westminster* aforesaid, more fully appears. And the said *A B* in fact saith, that the said *E F* hath not yet satisfied the

On recognisances of bail.

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(m) This is to be taken from the 537. as to the form of which, see 1 B. entry of the recognisance with which & P. 530. 2 B. & P. 443. 3 B. & P. it should correspond. See Imp. C. P. 39. Tidd's Prae. 227.

On recogni-
sances of bail.

said *A B* the damages aforesaid, by the said *A B* so recovered against the said *E F* as aforesaid, or any part thereof, or rendered his body on that occasion to the prison of the Fleet, according to the form and effect of the condition of the said recognisance, and that he the said *A B* hath not yet obtained execution of the said judgment against the said *E F*, nor any execution upon the said recognisance. And the said *A B* further saith, that the said judgment, so obtained against the said *E F*, still remains in full force, strength and effect, not in any way reversed, vacated, paid off or satisfied, whereby an action hath accrued to the said *A B* to demand and have of and from the said *C D* the said sum of —*l.* in form aforesaid *acknowledged and above demanded. Yet, &c. (Usual conclusion in debt, *ante*, 144.)

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Pl. Declaration of a final judgment in *K. B.* or *C. P.* or exchequer, in assumpsit.
(*n*)

Middlesex, (to wit.) (*o*) *A B* complains of *C D*, &c. [*Commencement in K. B. or C. P. as usual in debt, ante*, 141. and *proceed as follows* :] For that whereas the said *A B* heretofore, to wit, in — term, (*p*) in the — year of the reign of our lord the now king, in the court of our said lord the king, before the king himself, the said court then and still being holden at *Westminster*, in the county of *Middlesex*, by bill without the writ of our said lord the king, (or if in *C. P.* say, “before the *Rt. Hon. Sir James Mansfield, knt. and his companions, then and still being his majesty’s justices of the bench here, to wit, at Westminster, in the county of Middlesex*,” or if in the *exchequer* say, “in the court of our said lord the king, before the barons of his exchequer, at *Westminster, in the county of Middlesex*,”) by the consideration and judgment of the said court,

(*n*) Debt lies in the superior courts on a judgment obtained in the inferior courts, and *vice versa*, *Gillb. Debt*, 392, 393. The courts, however, discourage actions of debt on judgment, *Id. ibid.* and by 43 *Geo. III. c. 46. s. 4* the plaintiff in such action is not entitled to costs, unless the court will make an order for that purpose. Error in the judgment is no ground of objection in an action upon it, 2 *Lev. 151*. As to the declaration in gen-

ral, see *Gillb. Debt*, 412. &c. *Com. Dig. Pleader*, 2 *W. 12*. 1 *Saund. 92 n. 2*. 329. n. 1, 2, 3. *Ante*, vol. 1. Index, tit. Debt.

(*o*) The venue is local, *Gillb. Debt*, 413. *Ante*, vol. 1. Index, Venue.

(*p*) The term and parties must be shewn, *Com. Dig. Pleader*, 2 *W. 19*. As to pleading a judgment in an inferior court, *Id. ibid.* 1 *Saund. 92 n. 2*. *Ante*, vol. 1. Index, Declaration

recovered against the said *C D*,† the sum of —*l.* above demanded, which in and by the said court were then and there adjudged to the said *A B* for his damages, which he had sustained as well by reason of the non-performance by the said *C D* of certain promises and undertakings, then lately made by the said *C D* to the said *A B*, as for his costs and charges, by him about his *suit in that behalf expended, whereof the said *C D* was convicted, as by the record and proceedings thereof, remaining in the said court of our said lord the king, before the king himself, (or if in *C. P.* say, “of the bench aforesaid, at Westminster aforesaid,” or if in the exchequer, say, “of our said lord the king, before the barons of his exchequer, at Westminster aforesaid,”) more fully appears, which said judgment still remains in full force and effect,(g) not reversed, satisfied, or otherwise vacated. And the said *A B* hath not obtained any execution or satisfaction of or upon the said judgment so recovered as aforesaid; whereby an action hath accrued to the said *A B* to demand and have of and from the said *C D*, the said sum of —*l.* above demanded; yet, &c. [*Conclusion as ante*, 144. and insert damages sufficient to cover interest, &c.]

On judgment.

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[*As in the last precedent as far as the obelisk, and then proceed as follows:*] As well a certain debt of —*l.* as also —*l.* which in and by the said court of our said lord the king, before the king himself, (or if in *C. P.* “which in and by the said court of our said lord the king, of the bench,”) were then and there adjudged to the said *A B* for his damages, which he had sustained, as well by reason of the detention of the said debt as for his costs and charges, by him about his suit in that behalf expended, whereof the said *C D.* was convicted, as by the record, &c. [*As in the last precedent to the end.*]

The like on judgment in debt.

[*Same as the precedent, ante*, 181. to the obelisk, then proceed as follows:}] “The sum of —*l.* above demanded, which in and by the said court, of our said lord the king, before the king himself, were adjudged to the said *A B*, and with his assent

On judgment for the defendant on verdict.

(g) As to this allegation, Com. Dig. 1 Saund. 330. n. 4. Pleader, 2 W. 12. it is not necessary,

On judgment.

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for his costs and charges, by him laid out and expended, in and about his defence of a certain action of trespass on the case on promises, (*or as the action *is,*) then lately prosecuted in the said court by the said *C D* against the said *A B*, whereof the said *C D* was convicted, as by the record, &c. [*Same as the precedent, ante, 182. to the end.*]

The like on other judgments.

[*For the description of a judgment of nonpros — for not entering the issue—, or as in case of a nonsuit —, or on a nonsuit, see Tidd's Forms, 2 edit. 331 to 333.*]

VI. ON STATUTES.

[*Commencement in debt as usual, ante, 141.*]

By party grieved.

28. Landlord against tenant, on stat. 4 Geo. II. c. 28. s. 1. for double value for not quitting in pursuance of the landlord's notice.(s)

For that whereas the said *C D* before and at the time of the giving of the notice, and making the demand as hereinafter mentioned, and from thence until and upon the — day of —, *A. D.* [*the day when the tenancy determined,*] held and enjoyed a certain messuage and lands, and premises, with the appurtenances, situate, &c. as tenant thereof to the said *A B*, that is to say, as tenant thereof from year to year, for so long time as they the said *A B* and *C D* should respectively please, the reversion of the said premises, with the appurtenances, during all that time belonging to the said *A B*, to wit, at, &c. aforesaid; and thereupon whilst the said *C D* so held and enjoyed the tenements, with the appurtenances, as tenant thereof to the said *A B* as aforesaid, and whilst the said reversion so belonged to the said *A B* as aforesaid, to wit, on, &c. [*the date of the notice,*]

(s) When the tenant gives the notice to quit, he forfeits double rent, under the 11 Geo. II. c. 19. recoverable either in assumpsit or debt. But the 4 Geo. II. c. 28. directs the action to be debt when the tenant neglects to quit in pursuance of the landlord's

notice; and a distress cannot be supported, see 4 Burr. 1608. Vin. Abr. Distress, E. See the decisions and various precedents on this statute, 5 Burr. 2694. 1 New Rep. 174 and 7 Wentw. Index, 564, 565.

at, &c. he the said *A B* gave a notice in writing^(t) to the said *C D*, and then and there demanded^(u) *and required him the said *C D* to deliver up the possession of the said tenements, with the appurtenances, to the said *A B*, on the said, &c. on which day the term, estate and interest of the said *C D* in the said tenements, with the appurtenances, determined, to wit, at, &c. Nevertheless the said *C D*, not regarding the statute in such case made and provided, did not, nor would, on the determination of the said term as aforesaid, deliver the possession of the said tenements, with the appurtenances, to the said *A B* according to the said notice so given, and the said demand so made as aforesaid, but wholly neglected and refused so to do, and on the contrary thereof, he the said *C D* wilfully held over the said tenements, with the appurtenances, after the determination of the said term, and after the said notice so given, and the said demand so made as aforesaid, for a long space of time, to wit, for the space of —, then next following, during all which time the said *C D* did keep the said *A B* out of the possession of the said tenements, with the appurtenances, (he the said *A B* being, during all that time, entitled to the possession thereof,) to wit, at, &c. aforesaid, contrary to the form of the statute in such case made and provided.^(x)— And the said *A B* avers, that the said tenements with the appurtenances, during the said time of holding over the same,

*By party
grieved.*

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(t) A notice in writing is necessary, by the express words of the statute, 1 New Rep. 180. n. a. Burr. 603.

(u) The precedents sometimes run, "and thereby then and there demanded," &c. founded on the decision in 5 Burr. 2694. and 1 New Rep. 174. 179. that the notice itself is a sufficient demand, and, therefore, that no fresh demand after the expiration of the tenancy needs be averred or proved. It may, however, be advisable when, in fact, a demand of possession has been made after the expiration of the notice to quit, at least in one count, before the statement of the holding over to aver as follows: "And the said *A B* in fact saith, that after the determination of the said term of the said

C D as aforesaid, and whilst the said *C D* continued in the possession of the said tenements, with the appurtenances as aforesaid, and he the said *A B* was entitled to the possession thereof, to wit, on, &c. he the said *A B* demanded and required the said *C D* to deliver the possession of the said tenements, with the appurtenances, to him the said *A B*, to wit, at, &c. aforesaid. Nevertheless, &c.

(x) The precedents in 5 Burr. 2694. 1 New Rep. 174. and some of those referred to in 7 Wentw. Index, 464, 465. do not conclude *contra formam*, &c. but other precedents do so conclude, Com. Dig. Action upon Statute, G. Reg. Brev. 73. Lutw. 1548. Dyer, 85. a.

*By party
grieved.*

*and keeping the said *A B* out of the possession thereof, as aforesaid, were of great yearly value, to wit, of the yearly value of —*l.* of lawful, &c. and by reason of the premises, and by force of the statute in such case made and provided, the said *C D* became liable to pay to the said *A B* a large sum of money, to wit, the sum of —*l.* of like lawful money, being at the rate of double the yearly value of the said tenements, with the appurtenances, for so long time as the same were so detained as aforesaid, to wit, at, &c. aforesaid, and thereby, and by force of the said statute, an action hath accrued to the said *A B* to demand and have of and from the said *C D*, the said sum of —*l.* parcel of the said sum above demanded. [*Add two counts in debt, for use and occupation—the account stated—and common conclusion.*]

[*Commencement in debt, as ante, 141.*]

29. On 2 and 3 Edw. VI. c. 13. s. 1. for treble value of tithes not set out. (y)

For that whereas the said *A B* before, and at the several times hereinafter mentioned, was and still is farmer, (or "*rector*," or "*vicar*,") and proprietor(z) of the tithes of corn, grain and hay, yearly arising, growing, renewing and happening in, upon, and from divers, to wit, —(a) acres of land, situate, lying and being in the parish of —, in the county of —, and within the bounds, limits and tithable places of the same parish, and the said *C D*, during all the time aforesaid, was the occupier of the said land, to wit, at the parish, &c. aforesaid. And whereas all and singular the tithes of corn, grain and hay, yearly arising, growing, renewing and happening in, upon, and from the said land, now of the said *C D*, within forty years next before, and on the fourth day of *November*, in the second year(b) of the reign of *Edward VI.* late

(y) See precedents, 5 T. R. 260. 7 Wentw. Index, 558, 559.

(z) As to this allegation and the evidence, 4 Mod. 422. 3 T. R. 635. n. a. 4 T. R. 367.

(a) Any quantity sufficient to cover that occupied by the defendant.

(b) See 1 Saund. 139. It is improper to state that the statute was passed on the 4th of *November*, in the 2d and 3d, &c. See Com. Dig. Action on Statute, I. Moore, 302. Cowp. 474.

king of *England*, &c. of right, ought(c) to have been set out and paid in kind to the farmer or proprietor of those tithes, for the time being, to wit, at the parish, &c. aforesaid. And the said *AB* so being farmer and proprietor of the said tithes, and the said *CD* so being the occupier of the said land as aforesaid, he the said *CD* heretofore, to wit, on, &c. and on divers other days and times, between that day and the — day of —, in the same year did reap, mow and cut down, certain corn and grain, to wit, — acres of wheat, &c. then growing upon the said land, the tithe whereof belonged to the said *AB*, and of right ought to have been set out and paid to him as such farmer and proprietor as aforesaid, to wit, at the parish, &c. aforesaid. Yet the said *CD*, being a subject of this realm, and well knowing the premises, but not regarding the statute in such case made and provided, nor fearing the penalties therein contained, after the said reaping, mowing and cutting down, of the said corn and grain, and before the exhibiting of the bill of the said *AB*, against the said *CD* in this behalf, to wit, on, &c. aforesaid, and on the said several other days and times aforesaid, at the parish, &c. aforesaid, did take and carry the said corn and grain from the said land, where the same had so grown, and been so reaped and cut down, and where the same ought to have been tithed, (the tenth part thereof, or any part thereof not having been separated, divided, or set out from the nine parts thereof, nor any composition or agreement made for the tithe thereof, or of any part thereof, with the said *AB*,) contrary to the form of the statute in such case made and provided.(d) And the said *AB* in fact saith, that the tenth part of the said corn and grain so as aforesaid taken and carried away, at the time of taking and carrying away the same, was reasonably worth a large sum of money, to wit, the sum of —*l.* of lawful, &c. whereby and by force of the statute in such case made and provided, *an action hath accrued to the said *AB*, to demand and have of and from the said *CD*, the said sum of —*l.* parcel of the said sum above demanded, being treble the value of the said tenth part of the said corn

*By party
grieved.*

* 187

(c) As to this allegation, see 5
T. R. 260.

(d) As to this allegation, see *ante*,
184. n. (x).

By party
grieved.

and grain, so taken and carried away as aforesaid. [*Add a count in debt for tithes, as ante, 18. and conclude in debt, as ante, 144.*]

11. By common inform-
ers.

30. On 5 Ann.
c. 14. against
an unqualified
person for
using a gun to
kill game.(e)

[*The commencement is as ante, 141. the penalty being given entirely to the plaintiff, 2 Geo. III. c. 19. s. 5. When the plaintiff sues qui tam, the commencement is different: see The Forms of Court.*] For that he the said C D, within the space of six(f) months next before the commencement of this suit, to wit, on, &c.(g) at the parish of,(h) &c. in the county of, &c. did use(i) a certain gun, (or "greyhound,")(k) to kill and destroy(l) the game of that part of the united kingdom of Great Britain and Ireland, called England, the said gun then and there being an engine(m) for killing and destroying of such game;(n) and he the said C D not then being a person qualified(o) by the laws and statutes of this realm, or any of them so to do,

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(e) This statute was made perpetual by 9 Ann. c. 25. The 8 Geo. I. c. 19. gives double costs; the 2 Geo. III. c. 19. gives the whole penalty to the informer when he proceeds by action. See the precedents for different offences, 7 Went. Index, 561, 562.

(f) This allegation seems unnecessary, though the action must be brought within six lunar months, 2 East, 353. 362.

(g) The precise day is not material.

(h) The name of the parish is not material in a penal action, unless a part of the penalty be given to the poor thereof, 3 Esp. Rep. 218.

(i) As the keeping of a gun is *prima facie* lawful, it seems unnecessary to insert a count for keeping a gun for the destruction of game, 1 Wils. 315. 2 T. R. 18. but in case of dogs and snares, &c. it is usual to insert two counts, one for keeping, and the other for using the same for the destruction of game.

(k) As the statute only specifies particular dogs, viz. greyhounds, setting-dogs and lurchers, it is necessary so to describe the dog. A conviction for using a *hound* was quashed, Burns' Justice, tit. Game, III. 2 Str. 1126. Com. Rep. 576.

(l) This is the language of the 5 Ann. c. 14. s. 4. Plead. Assistant, 296.

(m) As to this allegation, see Com. Rep. 524. 576, 577. Cowp. 825.

(n) *Id. ibid.* Com. Rep. 577.

(o) It is not necessary in a declaration to negative particularly the qualifications mentioned in 22 and 23 Car. II. c. 25. and the general averment of the defendant's not being qualified is sufficient, 2 Com. Rep. 524. 576. 1 East, 649. Nor is it necessary for the plaintiff to negative the qualifications in evidence, 1 B. & P. 468, 469. but this is otherwise in the case of a conviction, 1 East, 639. 3 East, 192. 197, 198. 200. 3 B. & P. 307. 1 T. R. 648.

contrary to the form of the statute(*p*) in such case made and provided, whereby and by force of the statute in such case made and provided, the said *C D* forfeited for his said offence the sum of 5*l*.(*q*) and thereby and by force of the statutes(*r*) in such case made and provided, an action hath accrued to the said *A B* to demand and have of and from the said *C D*, the said sum of —*l*. so forfeited as aforesaid, parcel of the said sum above demanded.

By common informer.

And the said *A B* in fact further saith, that the said *C D*, within the space of six months next before the commencement of this suit, to wit, on the said, &c. at, &c. aforesaid, did expose to sale(*t*) a certain partridge, the game of *England* aforesaid, he the said *C D* not then being a person qualified in his own right to kill game, or being entitled thereto under any person so qualified, contrary to the form of the statute in such case made and provided; whereby and by force of the statutes in such case made and provided, the said *C D* forfeited for his said last-mentioned offence the further sum of 5*l*. and thereby and by force of the statutes in that case made and provided, an action hath accrued to the said *A B* to demand and have of and from the said *C D*, the said sum of 5*l*. so forfeited as last aforesaid, residue of the said sum above demanded. Yet the said *C D*, &c. [*Common conclusion, ante, 144. omitting the words "to the damage," &c. see ante, 2. n. (f).*]

Second count on 9 Ann. c. 25. for exposing game to sale.(*s*)

* 189

And whereas also, the said *C D*, after the first day of *July*, in the year of our Lord, 1791,(*x*) and before the commence-

Count on 25 Geo. III. c. 50. and 31 Geo. III. c. 21. for killing game without certificate.(*u*)

(*p*) 5 Ann. c. 14. Com. Rep. 578.

(*q*) 5 Ann. c. 14. As to what penalty is recoverable against several persons, or for several acts on the same day, 4 T. R. 809. Cowp. 646. 10 Mod. 26. 5 T. R. 510.

(*r*) As one statute makes the offence, and another statute, 2 Geo. III. a. 19. gives the whole penalty to the plaintiff, this allegation, in the plural number, is correct, 2 East, 333.

(*s*) See the notes to the prior count.

(*t*) Any unqualified person having game in his possession, and not being

entitled thereto under some qualified person, is subject to this penalty, though in fact he never offered game to sale, 9 Ann. c. 25. s. 2.

(*u*) See the notes to the precedent, *ante*, 187. This action must be brought in the name of the attorney-general, or the solicitor, or some other officer of the stamp duties; see 44 Geo. III. c. 98. s. 10. and therefore when the action for using dogs, &c. is brought in the name of a common informer, this count cannot be joined.

(*x*) See 31 Geo. III. c. 21. s. 1.

*By common
informant.*

ment of this suit, to wit, on, &c. at, &c. did use a certain gun (or "dog")^(y) to kill and destroy the game of *England* aforesaid, without having obtained the certificate in that behalf directed and required by the statutes^(z) in such case made and provided, in such manner as therein is directed, contrary to the form of the same statutes, whereby and by force of the same statutes, the said *C D* forfeited for his said last-mentioned offence, the sum of 20*l.* and thereby and by force of the same statutes, an action hath accrued to the said *A B* to demand and have of and from the said *C D*, the same sum of 20*l.* so forfeited as aforesaid, other parcel of the said sum above demanded.

(y) As the 25 Geo. III. c. 50. s. 8. (z) 25 Geo. III. c. 50. 31 Geo. III. extends to all descriptions of dogs c. 21. and engines, the observations, *ante*, 187. n. (k), do not here apply.

III. DECLARATIONS IN COVENANT.

I. ON LEASES.

Markham and Le Blanc.

*Thursday next after fifteen days of St.
Hilary, in Hilary Term, 47 Geo. III.(a)*

Middlesex, (to wit.) (b) *A B* complains of *C D*, being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea of breach of covenant. (c) For that whereas, heretofore, to wit, on the — day of —, *A. D.* (d) at, &c. (e) by a certain indenture then and there made between the said *A B* of the one part, and the said *Profrt.*

1. By lessor
against lessee,
for rent.

The indent-
ure.

(a) As to the title of the declaration, see *ante*, 1. n. (a).

(b) As to the venue in covenant on leases in general, see vol. 1. Index, Declaration, Venue. In covenant by lessor against lessee the venue is always transitory, but it is local against the assignee of the lessee.

(c) In the common pleas the commencement runs as follows: " — (to wit.) *C D* was summoned to answer *A B* of a plea, that he keep with him the covenant made by the said *C D* with the said *A B*, according to the force, form and effect, of a certain indenture, made between them," &c. (or if by the assignee of

the reversion, "made by the said *C D* with *E F* and his assigns;" or if by an heir, "with *E F* and his heir;" or if against the assignee of the reversion, "made by *G H* for himself and his assigns, with the said *A B*,") "and thereupon the said *A B*, by —, his attorney, complains. For that whereas," &c.

(d) A deed may be stated in pleading to have been made on a day different from its date, omitting the words, "bearing date," &c. 4 East, 477. but it is most usual to insert the date.

(e) As to the venue, *supra*, note b.

<i>Leitor</i>	<i>C D</i> of the other *part, (<i>f</i>) (the counterpart(<i>g</i>) of which said
<i>Leasee, &c.</i>	indenture sealed with the seal of the said <i>C D</i> , the said <i>A B</i>
The demise.	now brings here into court, the date whereof is the day and
	year aforesaid,) the said <i>A B</i> did demise, (<i>h</i>) lease, set and to
The promises.	farm let unto the said <i>C D</i> , his executors, administrators and
The habendum.	assigns, a certain messuage or dwelling-house, &c. situate,
	&c. (<i>i</i>) (except as in the said indenture is excepted) to have and
	to hold the said messuage or dwelling-house, &c. with the ap-
	purtenances, (except as aforesaid,) unto the said <i>C D</i> , his exe-
	cutors, administrators, and assigns, from the — day of —,
	then last past, to the full end and term of — years thence
The reddendum.	next ensuing, and fully to be complete and ended. Yielding
	and paying therefore yearly and every year, to the said <i>A B</i> ,
	his heirs or assigns, the clear yearly rent or sum of — <i>l.</i> paya-
	ble quarterly, at the four most usual feasts or days of payment
* 193	of rent in the year, (*that is to say,) on the 25th day of <i>March</i> ,
	the 24th day of <i>June</i> , the 29th day of <i>September</i> , and the 25th
	day of <i>December</i> , in each and every year, by even and equal
The covenant to pay rent.	portions. And the said <i>C D</i> did thereby for himself, his exe-
	cutors, administrators and assigns, covenant, promise and

(*f*) It is not necessary nor advisable to state the addition of the parties.

(*g*) If both parts of the deed be originals, that is, signed by all the contracting parties, say, "one part of, which said indenture," &c. A profert, or an excuse for the want of it, must in general be stated, or the declaration will be bad on special demurrer, 4 Ann. c. 16. If a profert be stated and the deed cannot be produced, the plaintiff will be nonsuited, on the plea of *non est factum*, 4 East, 585. As to proferits in general, see Index, vol. 1. tit. Profert. 1 Saund. 9. n. 1. *Ante*, 153.

(*h*) The lease generally runs, "hath demised," &c. and "doth demise," &c. the last words only are to be stated in the past tense, and every other part of the lease necessary to be stated, is to be set forth in general in the past tense, and according to the legal effect; in a declaration,

"the *testatum existit*," or, "it is witnessed, &c. that *A B* demised," is sufficiently certain, though not in a plea; see vol. 1. Index, tit. *Testatum Existit*, 1 Saund. 274. n. 1. *Ld. Raym.* 1539.

(*i*) If the description of the premises be very long, say, "certain tenements, with the appurtenances particularly mentioned and described in the said indenture, situate," &c. and in order to avoid variance, it is advisable not to state the abutments, or any other very particular description, 1 Saund. 233. n. 2. 2 Saund. 366. n. 1. The court will censure the statement of any superfluous matter, *Cowp.* 665. 727. *Doug.* 667. If, however, personal property have been demised, together with land, &c. the above concise statement will not suffice; and when the action is for not repairing buildings, ditches, &c. it is most usual to state all such premises.

agree, to, and with the said *A B*, his heirs^(k) and assigns, that he the said *C D*, his executors, administrators or assigns, should and would well and truly pay, or cause to be paid, to the said *A B*, his heirs or assigns, the said yearly rent or sum of —*l*. at the several days and times aforesaid.^(l) As by the said indenture reference being thereunto had will (amongst other things) more fully and at large appear.^(m) By virtue of which said demise, the said *C D* afterwards, to wit, on, &c. entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof, for the said term so to him thereof granted as aforesaid.⁽ⁿ⁾ And although the said *A B* hath always, from the time of making the said indenture, hitherto well and truly performed, fulfilled and kept all things in the said indenture contained on his part and behalf, to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning of the said indenture, to wit, at, &c. aforesaid.^(o) *Yet protesting that the said *C D* hath not performed, fulfilled or kept, any thing in the said indenture contained on his part and behalf, to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning thereof,^(p) the said *A B* saith, that after the making of the said indenture, and during the said term thereby granted, to wit, on, &c.^(q) at, &c. aforesaid, a large sum

Lessor
v.
Lessee, &c.

Reference to
lease.

Lessee's entry.

Plaintiff's general performance.

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Defendant's general non-performance.

Particular breach; non-payment of rent.

(k) The words of the lease and covenant are in general to be set out verbatim. When the lessor is seised in fee, the covenants are with him and his heirs and assigns; but if he be only a termor, they are with him and his executors, administrators and assigns.

(l) No unnecessary covenant or other irrelevant parts of the deed, should be stated, 1 Saund. 233. n. 2. 2 Saund. 366. n. 1. *Ante*, 192. n. (i).

(m) The reference to the lease is not necessary.

(n) In an action against a lessee for years, it is not necessary to allege an entry, 1 Saund. 203. n. 1. Com. Dig. Pleader, 2 W. 11. Doug. 455. and even against the assignee of the lessee, such averment seems unnecessary;

see Woodfall's Law of Landlord and Tenant, 2d edit. 7 East, 340. n. a.

(o) This general averment of performance by the plaintiff is unnecessary, 1 Saund. 235. n. 5. If there be a condition precedent, performance must be specially shewn, as in the next precedent, see vol. 1. Index, tit. Declaration.

(p) There is no occasion for this *protestando* or allegation of the general non-performance of covenants by the defendant; the declaration may proceed at once to the material averments, and the particular breach for which the action is brought.

(q) It must be shewn when the rent became due, Gilb. on Debt, 407.

Lessor
v.
Lessee, &c.

Usual con-
clusion.

of money, to wit, the sum of —l. of the rent aforesaid, for — years and a half of the said term then elapsed, became, and was, and still is in arrear and unpaid, to the said *A B*, contrary to the tenor and effect, true intent and meaning of the said indenture, and of the said covenant(r) of the said *C D*, by him in that behalf, so made as aforesaid; to wit, at, &c. aforesaid. And so the said *A B* in fact saith,(s) that the said *C D* (although often requested so to do) hath not kept his said covenant so by him made as aforesaid, but hath broken the same, and to keep the same with the said *A B* hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said *A B* of —l.(t) and therefore he brings his suit, &c.

Pledges, &c.

2. Lessor against assignee of lessee, for not repairing, with averment of plaintiff's performance of a condition precedent.(u)

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[The commencement is as ante, 195. and in *C. P.* as ante, 191. n. (c), and then proceed as follow s: For that whereas heretofore, to wit, on, &c. at &c. by a certain indenture then made and there made between the said *A B* of the one part, and one *E F* of the other part, (the counterpart of which said indenture, sealed with the seal of the said *E F*, the said *A B* now brings here into court, the date whereof is the same day and year aforesaid,) the said *A B* for the considerations therein mentioned, did demise, lease, set and to farm let, unto the said *E F*, his executors, administrators and assigns, all that messuage, &c. [Here set out the premises—the habendum and the

(r) The breach may be in the negative of the covenant generally, 3 T. R. 307. or according to the legal effect, 1 Saund. 235. n. 6. As to the averments, and the statement of the breach in general, see vol. I. Index, tit. Declaration Breach.

(s) This statement is unnecessary, for there being a breach of covenant alleged before, it is holden unnecessary to make a repetition of it in the conclusion, 1 Saund. 235. n. 7.

(t) In all declarations in covenant, a sum should be inserted sufficient to

cover the real demand and interest to the time of final judgment.

(u) Most of the notes to the preceding precedent, are applicable to this. An heir, (4 T. R. 75.) and an executor, (1 Salk. 316, 317.) may be declared against as assignee, for a breach of covenant after he became interested. An under-lessee cannot be sued by the lessor in covenant or debt on the lease, *Holford v. Hatch*, Doug. 188. 445. Cowp. 766. What is *prima facie* evidence of defendant's being assignee, see *Peake's Law Evid.* 266, 267.

reddendum shortly, as advised in 1 Saund. 233. n. 2. 2 Saund. 366. n. 1. Ante, 192. n. (i), and then state the covenants as follows:] And the said *E F* did, in and by the said indenture for himself and his executors, administrators and assigns, covenant, promise and agree, to and with the said *A B*, his heirs and assigns, (amongst other things,) in manner following, (that is to say,) that he the said *E F*, and assigns, from and after the said messuage, &c. &c. should have been put in good and tenantable repair by and at the expense of the said *A B*, his heirs and assigns, should and would at all times, during the continuance of the said demise, at his and their own costs and charges, support, uphold, maintain and keep the said messuage or tenement and buildings, gates, stiles, &c. (*as in the covenant,*) in good and tenantable repair, order and condition, (being allowed timber in the rough sufficient and proper for such repair, from time to time to be provided and set out by the said *A B*, his heirs or assigns,) and the same premises, and every part thereof, should and would leave in such good repair, order, and condition, at the end or other sooner determination, of said term, and should and would peaceably and quietly quit, yield and deliver up to the said *A B*, his heirs or assigns, without doing, committing, or suffering *to be done or committed, any waste, spoil, or damage to the same, or any part thereof. And also should and would well and sufficiently uphold, cleanse, scour and repair, yearly and every year during the said demise, all the ditches, trenches and water-courses, in the piece or parcel of meadow land called — meadow, and all other the ditches, trenches and water-courses, in and upon every part of the said other premises thereby demised, as often as necessary, so as the same were kept cleansed, scoured, repaired and in good condition, and should and would deliver up unto the said *A B*, his heirs or assigns, the same in such good order and condition, at the end of the same term as aforesaid. As by the said indenture reference being thereunto had, will (amongst other things) more fully and at large appear. And the said *A B* in fact saith, that after the making of the said indenture, and during the said term thereby granted, to wit, on, &c.(x) at, &c. aforesaid, all

Lessor
v.
Lessee, &c.
Covenant to repair, after lessor should have put in repair, and being allowed rough timber.

Covenant to leave in repair.

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Covenant to cleanse ditches, &c.

Reference to the lease.

Assignment to the defendant.

(x) The day is not material; it is time of the supposed assignment to usual to insert some day about the the defendant. In an action by the

Lesser
v.
Lessee, &c.

Defendant's
entry.

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General per-
formance by
plaintiff.

Defendant's
general non-
performance.

First breach,
in not repair-
ing and leav-
ing out of re-
pair.

the estate, right, title, interest, term of years then to come and unexpired, property, profit, claim and demand whatsoever, of him the said *E F*, of, in, and to the said demised premises, with the appurtenances, by assignment thereof, then and there made legally came to and vested in the said *C D*. Whereupon and whereby the said *C D* then and there entered(y) into and upon all and singular the said demised premises, with the appurtenances, and became and was thereof possessed, and continued so thereof possessed, from thence *until the — day of —, *A. D.* —, when the said demise ended and determined, to wit, at, &c. aforesaid. And although the said *A B* hath always, from the time of making the said indenture, hitherto well and truly performed, fulfilled and kept, all things therein contained, on his part and behalf to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning thereof, to wit, at, &c. aforesaid. Yet protesting that the said *C D*, since the said assignment so made as aforesaid, hath not performed, fulfilled, or kept any thing in the said indenture contained, on his part and behalf, as such assignee as aforesaid, to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning of the said indenture, the said *A B* in fact saith, that the said *C D* did not, nor would, after the said assignment, and during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances as aforesaid, at his own costs and charges, support, uphold, maintain and keep, all and every the said messuage or tenement, and buildings, gates, &c. (*as in the covenant*.) of the said demised premises, in good tenantable repair, order and condi-

assignee of the reversion, he must set forth in the declaration the operative part of the deed, &c. by virtue of which he is entitled to the reversion, 1 Saund. 112. b. n. 1. 234. n. 3. though an assignee of a term need not shew the assignment to have been by deed, 1 Saund. 234. n. 3. 276. notes 1 and 2. In an action against the assignee of the lessee, &c. the above concise statement is in all cases sufficient, though there may have

been intermediate assignments, see vol. 1. Index, tit. Declaration Covenant, 1 Saund. 112. b. n. 1. 6 Mod. 72. See mode of pleading on assignment of a term to commence in *future*, 1 Saund. 253. and this form will suffice even against an heir, when declared against, as he may be, as assignee, 4 T. R. 75.

(y) This does not seem necessary, *ante*, 193. n. (n).

34.

tion, (although the said messuage or tenement, and out-buildings, in the possession of the said *E F* at the time of making the said indenture, were after the making thereof, to wit, at, &c. put in good and tenantable repair, by and at the expense of the said *A B*, and although timber in the rough, sufficient and proper for such repairs, was allowed, and from time to time provided and set out by the said *A B*, to wit, at, &c. aforesaid,) nor did, nor would, leave the same premises in such good repair, order and condition, at the determination of the said term, according to the form and effect of the said indenture in that behalf, but on the contrary thereof he the said *C D*, after the making of the said indenture, and after the said assignment to him the said *C D*, as aforesaid, and during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances as aforesaid, to wit, on, &c. and from thence for a long space of time, to wit, from thence until the determination of the said term, suffered and permitted the said messuage, dwelling-house, buildings, gates, &c. (as in the covenant) to be and continue, and the same were for and during all that time, ruinous, prostrate, fallen down, and in great decay, for want of needful and necessary maintaining, supporting, upholding and keeping the same; and the said *C D*, at the determination of the said term, left the same premises in such repair, order and condition, as last aforesaid, contrary to the form and effect of the said indenture, and of the covenant so made by the said *E F* for himself and his assigns, as aforesaid, to wit, at, &c. aforesaid. And the said *A B* in fact further with, that the said *C D* did not, nor would, yearly and every year, during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances, as aforesaid, well and sufficiently uphold, cleanse, scour, or repair, all the ditches, trenches and water-courses, in the said piece or parcel of meadow land, called — meadow, and all other the ditches, trenches and water-courses, in or upon the said premises, by the said indenture demised, as often as was necessary, so as to keep the same cleansed, scoured, repaired, and in good condition; nor did,

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v.
Lessee, &c.
Averment of
performance
by plaintiff of
conditions
precedent.
(z)

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Second
breach, for
not cleansing
ditches, &c.

(z) As to conditions precedent, vol. 1. Index, Condition Precedent.
see Saund. 352. c. Willes, 496. *Ante*,

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v.
Lessee, &c.

nor would deliver up the same unto the said *A B*, in such good order and condition at the end of the said demise, according to the form and effect of the said indenture in that behalf, but wholly neglected so to do, and on the contrary thereof he the said *C D*, after the making of the said indenture, and of the said assignment, and during the continuance of the said demise, and whilst he was so possessed of the said demised premises, with the appurtenances, to wit, on, &c. and from thence for a long space of time, to wit, from thence until the determination of the said demise, suffered and permitted the said ditches, trenches and water-courses, *in the said piece or parcel of land called — meadow, and all other the ditches, trenches and water-courses, in the said premises, by the said indenture demised to, be and continue, and the same were for and during all the time last aforesaid, foul, miry, choaked up and ruinous, out of repair, and in bad order and condition, for want of well and sufficiently cleansing, scouring and repairing as aforesaid; and at the determination of the said term, he the said *C D* delivered up the same unto the said *A B* in such order and condition as last aforesaid, contrary to the form and effect of the said indenture and of the said covenant in that behalf made as aforesaid, to wit, at, &c. aforesaid. And so the said *A B* in fact, saith, that the said *C D* (although often requested so to do) hath not kept the said covenants so made by the said *E F* for himself and his assigns, with the said *A B*, in manner and form aforesaid, but hath broken the same, and to keep the same with the said *A B* hath hitherto wholly refused, and still refuses so to do. To the damage of the said *A B* of —. and therefore he brings his suit, &c.

Conclusion.

Breaches in
general.

Breaches of different covenants between lessor and lessee, &c. may readily be framed according to the particular circumstances of each case, and in general may be in the negative of the words of the covenant; see 3 *T. R.* 307. and *ante*, 194. n. (r), vol. 1. chapter on declarations. The above precedents may therefore, in this respect suffice. But as difficulties frequently occur in stating the different titles of plaintiffs in covenant, the following forms are given, and which are arranged nearly according to the plan in 2 *Bl. Com.* respecting real estates.

II. TITLE PLEADED.

1. TENURE.

For that whereas before and at the time of the making of the indenture hereinafter mentioned, one *E F* was seised in his demesne as of fee, of and in the tenements hereinafter mentioned to have been demised, and held the same in free burgage of the city of London, and being so seised heretofore, to wit, on, &c. at, &c.

3. Tenure in free burgage.
(a)

* 200

2. ESTATE AND QUANTITY OF INTEREST.(a)

[See the commencement, ante, 191.] For that whereas one *G H*, before and at the time of the making of the indenture hereinafter mentioned, was seised(b) in his demesne(c) as of fee,(d) of and in the tenements, with the appurtenances hereinafter mentioned to have been demised, to wit, at, &c. And being so seised heretofore, to wit, on, &c. at, &c. by a certain indenture then and there made between the said *G H* of the one part, and the said *C D* of the other part, one part, &c. [here set out the profert, and all necessary parts of the lease, as ante, 191. and 199. as to the statement of the conveyance, &c. by virtue of

4. Indue-
ment that les-
sor was seised
in fee-simple
of corporeal,
or incorpo-
real heredita-
ments.

(a) 2 Saund. 234. As to the statement of copyhold and customary freeholds, see post, 205. and 207. and of seisin in gavelkind, 1 Burr. 325. Of a rent, 2 Rich. C. P. 350. Of an advowson, &c. see post infra, note (c).

(a) As to this division, see 2 BL Com. 103.

(b) As to the words "seised," or "possessed," see Com. Dig. Pleader, 2. 35. Co. Lit. 17. a.

(c) 2 BL Com. 105, 106. If the

estates be incorporeal, the words, "in his demesne" are to be omitted, 2 BL Com. 106. Co. Lit. 17. a. b. n. 1. Com. Dig. Pleader, C. 35. They seem also improper in pleading a reversion on an estate of freehold, Co. Lit. 17. b. n. 1. Plowd. 191. a. Seisin of an advowson, &c. "as of fee and right," 1 East, 485. Thomp. Ent. 203. Seisin by disseisin, 1 Saund. 55.

(d) As to the words "as of fee," see Co. Lit. 17. b.

II. Estate and quantity of interest. which the plaintiff claims. See post. If the seisin be stated as a consequence of a conveyance, &c. the statement runs as follows: "Whereupon and whereby the said *A B* then and there became, and was, and from thence hitherto hath been, and still is, seised in his demesne as of fee, of and in the said tenement, with the appurtenances, and being so seised," &c.]

* 201

5. Seisin in fee, &c. in husband and wife, in right of the wife. (e)

*[See the commencement, ante, 191.] For that whereas the said *A B* and *C* his wife, before and at the time of the making of the indenture hereinafter mentioned, were seised in their demesne as of fee, in right of the said *C*, of and in the tenements, with the appurtenances hereinafter mentioned to have been demised, to wit, at, &c. and being so seised, &c. [here state the lease by husband and wife, and the covenants, the lessee's entry, and the plaintiff's derivative title, &c. If the seisin in fee in right of the wife be stated as a consequence of a conveyance, &c. the statement is as follows:—"Whereupon and whereby the said *A B*, and *C* his wife, then and there became, and were, and from thence hitherto have been, and still are, seised in their demesne as of fee in right of the said *C*, (f) of and in the said tenements, with the appurtenances, and being so seised," &c.]

6. Seisin in the king, or in a corporation. (g)

For that whereas our sovereign lord the now king, on, &c. at, &c. was and still is seised in his demesne as of fee, in right of his crown of *England*, of and in, &c. to wit, at, &c.

(e) Doug. 329. 1 Saund. 253. n. 4. 2 Saund. 235. n. 2. 269. 285. n. 1. Hob. 1, 2.

(f) If this consequence be misstated, the declaration, &c. will be bad on special demurrer. Doug. 329. *sed quere vide* Plowd. 191. a.

(g) As to the statement of seisin in the king, see 1 Saund. 187. n. 1.

Dyer, 85. b. It must be shewn *quere*, the king is seised, whether in right of his crown, duchy of Lancaster, &c. 2 Bl. Com. 105, 106. As to the pleading a seisin in a corporation sole or aggregate, see 1 Saund. 187. n. 1. 2 Saund. 317. 319. n. 4. Thompson Ent. 305. And the precedent, 1 Saund. 106.

[See the commencement, ante, 191.] For that whereas one *E F*, before and at the time of the making of the indenture hereinafter mentioned, was seised in his demesne as of fee tail, (or if special entail, add, "that is to say, to him and the heirs lawfully issuing out of the body of him the said *E F*, on the body of —, to be begotten," or, "of the bodies of the said *E F*, and of —," &c.) of and in the tenements, with the appurtenances hereinafter mentioned to have been demised, to wit, at, &c. and being so seised, &c. [Here set forth the lease, &c. and the plaintiff's derivative title, &c. If the seisin in tail be stated as a consequence of a conveyance, &c. the statement is as follows: "Whereupon and whereby the said *E F* then and there became, and was, and from thence hitherto hath been, and still is, seised in his demesne, as of fee tail, of and in the said tenements, with the appurtenants."]

II. Estate and quantity of interest.

7. Seisin in tail.^(h)

* 202

[See the commencement, ante, 191.] For that whereas one *E F*, before and at the time of the making of the indenture hereinafter mentioned, was seised in his demesne as of freehold, for the term of his natural life, (or, "for the term of the natural life of *G H*,") of and in the tenements, with the appurtenances hereinafter mentioned to have been demised, to wit, at, &c. and being so seised, &c. [Here set forth the lease,

8. Seisin for life.⁽ⁱ⁾

(A) 1 Saund. 255. 2 Rich. C. P. 350. In a declaration, when the title is stated as inducement, the commencement of the estate tail needs not in general be stated, though it is otherwise in a plea, Com. Dig. Plead-er, E. 19. C. 35. In pleading seisin of an estate by gift to husband and wife, and to the heirs of the body of the wife by the husband begotten, as the wife has an estate in special tail, and the husband only an estate for life, it should be alleged, "that the husband and wife were seised together, and to the heirs of the body of the wife in her right," and not that they were seised of the freehold, or fee tail, Co. Lit. 26. a. n. 1. It is not necessary to aver the continuance of

the life of tenant in tail, or of the estate tail, 1 Saund. 235. b. n. 8.

(i) See the form, 1 Saund. 231. Com. Dig. Plead-er, C. 36. Co. Lit. 42. a. In a declaration, when the title is stated merely as inducement, it is not necessary to shew the commencement of the estate for life, but it is otherwise in a plea, Com. Dig. Plead-er, C. 35. E. 19. 1 Saund. 137. n. 1. Unless the *cestui qui vie* be a party to the action, or no title be derived under him, it must be averred that he was living at the time the cause of action accrued, as to which averment, see 1 Saund. 235. n. 8. 2 Bl. Com. 120. In pleading a lease for life, which passes by livery and seisin, no entry of the lessee should be stated, 11 Co. 52. b.

II. Estate and quantity of interest.

* 203

Ec. If the seisin for life be stated as a consequence of a conveyance, *Ec.* the statement is as follows: "Whereupon and whereby the said *E F* then and there became, and was, and from thence hitherto hath been, and still is, seised in his demesne as of freehold, for the term of his natural life, of and in," &c.

9. The like by a rector, in right of his rectory. (k)

For that whereas one *E F* before, and at the time of the making of the indenture hereinafter mentioned was, and still is, rector of the rectory of —, in the county of —, and as such rector then was, and thence hitherto hath been, and still is, seised in his demesne, as of freehold, in right of his said rectory, of and in the tenements hereinafter mentioned to have been demised, to wit, at, &c. and being so seised, &c. [*If his seisin be stated as a consequence of a conveyance, the allegation will nearly resemble that in the last precedent.*]

10. Tenancy by curtesy, or by dower. (l)

[*See the commencement, ante, 191.*] For that whereas one *E F*, before and at the time of the making of the indenture hereinafter mentioned, was seised of the tenements hereinafter mentioned to have been demised in his demesne, as of freehold, for the term of his life as tenant thereof, by the law of *England*, to wit, at, &c. and being so seised, &c. [*If the seisin be stated as a derivative title, state the marriage, birth of a child, and death of the wife, as in 2 Rich. C. P. 350.*] "Whereupon and whereby the said *E F* then and there became, and was, and from thence hitherto hath been, and still is, seised in his demesne as of freehold, of and in the said tenements, with the appurtenances, for the term of his life, as tenant thereof, by the law of *England*, *to wit, at, &c. [*See the precedent, 2 Rich. C. P. 350.*]

* 204

(k) See *Winch. Ent.* 1161. 2 *Saund.* 235. n. 2. The averment of the continuance of the rector's life when necessary, will be as in *Winch.* 1162.

(l) See 2 *Bl. Com.* 126. 3 *B. & P.* 632, 633. For precedents, see 2 *Rich. C. P.* 350. 1 *East*, 213. 1 *Saund.* 250. 256. In a declaration,

when the title is stated merely as inducement, the above form will suffice, but in a plea it is in general necessary to shew the commencement of the title as in some of the precedents referred to. As to pleading tenancy by dower, see 2 *Saund.* 423. 806. b. n. 13. 3 *East*, 276. *Vin. Abr.* tit. *Dower*, M. a. pl. 25. &c.

[See the commencement, ante, 191.] For that whereas the said *E F*, before and at the time of the making of the indenture of demise hereinafter mentioned, was lawfully possessed(n) of the tenements, with the appurtenances, hereinafter mentioned to have been demised to the said *C D*, that is to say, for the residue and remainder of a certain term of — years, commencing from, &c.(o) to come, and unexpired therein, to wit, at, &c. and being so possessed thereof, he the said *E F*, on, &c. at, &c. aforesaid, by a certain indenture, &c. as ante, 191.(h) If the possession of the residue of the term be stated as a consequence of an assignment, &c. the statement is as follows: "Whereupon and whereby the said *A B* became and was, and from thence hitherto hath been, and still is, possessed of the said tenements, with the appurtenances, for the residue and remainder of the said term therein, then to come, and unexpired therein, to wit, at, &c. aforesaid.

II. Estate and quantity of interest.

11. By assignee or executor of lessor being a termor against lessee. (m)

* 205

For that whereas before and at the time of making the indenture hereinafter mentioned, to wit, on, &c. at, &c. one *E F*

12. By executor of lessor, tenant from year to year, for breach of covenant in a lease for 21 years, granted by him.(g)

(m) When the action is at the suit of the assignee of a lessor who was a termor, or by the executor of such lessor for rent due after his death, it is necessary in order to shew the plaintiff's right of action, to state the lessor's title as above, and the assignee must set forth all the mesne assignments of the term down to himself, though we have seen it otherwise in a declaration against the assignee of a term, 1 Saund. 112. n. 1. Ante, 196. n. Clift. 221, 232. But it seems unnecessary to shew that the assignments were signed. 1 Saund. 234. n. 3. 276. n. 1. and 2. This concise mode of stating the interest is sufficient when the title is pleaded as inducement, Com. Dig. Pleader, E. 19. C. 35. Co. Lit. 17. a. As to pleading possession of a term in right of a wife, see Plowd. 191. a. sed vide Doug. 329. Ante, 201.

(n) The word "possessed," and not "interested," must be adopted, { Show. 106. 1 Saund. 251. n. 1. 106.

2 Saund. 176. n. 5. unless when the term is in reversion, 1 Saund. 251. n. 1. 2 Saund. 176. n. 5. in which case the interest is to be described as post, 208. n. (a).

(o) Sometimes the precedents merely state, "that is to say, for the residue of a certain term of years, whereof — years and upwards were then to come and unexpired," inserting a number of years sufficient to shew that the reversion was in the lessor, and this mode seems sufficient, the lessor's title being merely inducement.

(p) As to the statement of a tenancy, from year to year, see post, 205. next precedent, and in pleas in Trespass and Replevin, Mal. Ent. 58. 5. Wentw. 38. 64.

(q) This precedent was holden good on demurrer, in Mackey v. Mackreth, Hil. 1785. K. B. M. S. Mr. J. Ashurst's Paper Books, vol. 21. 110.

II. Estate and quantity of interest.

demised the tenements, with the appurtenances, hereinafter mentioned to the said *G H* deceased, his executors, administrators and assigns. To hold the same to the said *G H*, his executors, administrators and assigns, from, &c. for one year thence next ensuing, and fully to be complete and ended; and so from year to year, for so long time as they the said *E F* and *G H* should respectively please. By virtue of which said demise, the said *G H* entered into the said tenements, with the appurtenances so to him demised, as aforesaid, and became and was possessed thereof, and being so possessed thereof, heretofore, and during the continuance of the said demise, to wit, on, &c. at, &c. by a certain indenture then and there made between the said *G H* of the one part, and the said *C D* of the other part. The counterpart, &c. [*Here state the lease to the defendant, which was for twenty-one years—the covenants, reference to the lease, entry of, the lessee, the death of the testator, during the continuance of the first demise, having made his will, and thereby appointed plaintiff executor, that he proved the will, and thereby became possessed of the interest in the first demise, and then averring the breaches of covenant during the continuance of the first demise.*]

13. Inducement that the premises demised were copyhold, and that lessor was seised in fee. (r)

* 206

For that whereas before and at the time of the making of the demise hereinafter mentioned, and from time whereof the memory of man is not to the contrary, the tenements *hereinafter mentioned to have been demised, were and still are, situate within the manor of —, in the county of —, and parcel of the said manor and customary tenements thereof, demised and demisable, by copy of the courtrolls of the said manor, by the lord of the said manor, or by his steward of the court of the said manor for the time being, to any person or persons willing to take the same in fee-simple or otherwise, at the will of the lord of the said manor, according to the custom of

(r) As to the mode of describing copyhold in general, Com. Dig. copyhold of inheritance, or a lease. Pleader, E. 19. When the title as in this case, in covenant is pleaded, *Id.* 146. As to the necessity for the words, "at the will of the lord," see 1 Saund. 348. n. 4. Co. Litt. 58. a. n. 1. and as to pleading an *admittance*, see Vin. Abr. Copyhold, U. b. and of

the said manor, to wit, at, &c. aforesaid. And whereas also heretofore, to wit, on, &c. ———, then being lord of the said manor, at a special court-baron of him the said ———, so then being lord of the said manor, as aforesaid, then and there holden in and for the said manor, before ———, (s) the then deputy-steward of the courts of the said manor, by copy of the court-roll of the said manor according to the custom of the said manor, by his said deputy-steward granted the said customary tenement, with the appurtenances, to the said *E F*, to hold the same to him the said *E F*, his heirs and assigns forever, by copy of the court-roll of the said manor, at the will of the lord of the said manor, according to the custom of the said manor. By virtue of which said grant he the said *E F* afterwards, to wit, on the same day and year aforesaid, entered(t) into the said customary tenements, with the appurtenances, and became and was seised thereof in his demesne as of fee(u) at the will of the lord, according to the custom of the said manor, and continued so thereof seised, until the time of his decease, (or surrender, &c. according to the fact,) hereinafter mentioned. And the said *E F* being so seised of the said customary tenement, with the appurtenances as aforesaid, heretofore, to wit, on, &c. at, &c. by a certain indenture then and there made between the said *E F* of the one part, and the said *C D* of the other part, one part, &c. [*Here state the profits, covenants, reference to the lease, and entry of lessee, as in the precedent, ante, 191. and then state the surrender, &c. according to the fact, as post.*]

11. Estate and quantity of interest.

* 207

That whereas before and at the time of making the demise hereinafter mentioned, one *E F* was seised in his demesne as

14. The like in a more concise form. (x)

(s) It is necessary to state the "as of freehold for the term of his steward's name, Cro. Eliz. 392. Vin. life, at the will of the lord of the Abr. tit. Copyhold, U. b. pl. 3. and 5. said manor, according to the custom

(t) An entry should be averred of the said manor." 1 Saund. 147.

though it is not traversable, 1 Saund. 147. n. 2.

(x) See the notes to the last precedent. As to this form, 4 Co. 46.

(u) 1 Saund. 146, 147, or if for life, 22. b. Vin. Abr. Copyhold, U. b.

11. Estate and quantity of interest.

of fee, at the will of the lord of the manor of —, in the county of —, according to the custom of the said manor, of the tenements, with the said appurtenances hereinafter mentioned to have been demised to the said *C D*, the same tenements with the appurtenances then and still being part and parcel of the said manor, and a customary tenement thereof demised and demisable by the copy of the court-rolls of the said manor, by the lord of the said manor or by his steward of the court of the said manor, for the time being, to any person or persons willing to take the same in fee-simple or otherwise, at the will of the lord of the said manor, according to the custom of the said manor, to wit, at, &c. and being so seised, he the said *E F* heretofore, to wit, on, &c. at, &c. by a certain indenture, &c. [*State the lease, defendant's entry, the plaintiff's derivative title, and breach of covenants.*]

15. Customary freehold.
(g)

* 208

For that whereas before and at the time of the making of the demise hereinafter mentioned, and from time whereof the memory of man is not to the contrary, the tenements, with the appurtenances hereinafter mentioned to have been demised to the said *C D*, were and still are situate within *and parcel of the manor of —, in the county of —, and customary tenements thereof, and during all that time descendible, and which have descended from ancestor to heir, as of the hereditary right of the tenants, called tenant right, held of the lord of the said manor for the time being, as of that his manor by divers rents and certain services, according to the custom of the said manor. And that one *E F* before and at the time of the making of the demise hereinafter mentioned, was and from thenceforth until and at the time of the making of the indenture, &c. (*the conveyance under which the plaintiff claims,*) hereinafter mentioned, was seised of and in the said customary tenements, with the appurtenances, as of his customary hereditary estate, in form aforesaid, descendible and descending according to the custom of the said manor, held of the lord of the said manor, as of that his manor, as aforesaid. And the

(g) As to the statement of this case, & P. 378. 5 East, 51. &c. See, and the nature thereof, see 3 B.

said *E F* being so seised, thereupon heretofore, to wit, on, &c. *II. Estate and quantity of interest.*
 [State the lease, &c. as usual, the lessee's entry, plaintiff's derivative title, and the breaches.]

3. ESTATE AND TIME OF ENJOYMENT.(z)

For that whereas one *E F* before and at the time of the making of the indenture hereinafter mentioned, was seised in his demesne(b) as of fee, of and in the reversion of a certain messuage, &c. with the appurtenances, immediately expectant upon the death of *G H*, who was seised of the said tenement, as of freehold, as tenant thereof, by the law of *England*. And the said *E F* being so seised of the said reversion of the said tenements, with the appurtenances, he the said *E F* heretofore, to wit, on, &c. at, &c. by his certain indenture made between, &c. [Here state the indenture containing a demise to *J K* for twenty-one years, to commence after the death of the tenant for life; then state the lessee's interest in the lease as follows:] By virtue of which said demise the said *J K* then and there became and was possessed of the interest of the said term, expectant upon the death of the said *G H*. And the said *J K* being so possessed of the interest in the said term, and the said *E F* being so seised of the reversion thereof, expectant upon the death of the said *G H*, he the said *E F* afterwards, to wit, on, &c. [Here state bargain and sale, &c. by *E F* to the plaintiff, and assignment by *J K*, the lessee, to *C D*, the de-

16. Seisin in fee in reversion.(a)

* 209

17. Interest in a term to commence in futuro.(c)

(z) As to this division, see 2 Bl. Com. 163.

(a) See this precedent, with notes, 1 Saund. 250. &c. Attornment of tenant need not be alleged, 2 Saund. 305. b. n. 13. Doug. 283. a reversion after an estate tail, 2 Saund. 235.

(b) The precedents in Saund. 250. Co. Ent. 708. b. and 1 Saund. 106. contain the words "in his demesne," but other precedents omit them, Winch. 1103. 1 Saund. 166. When a reversion depends on an es-

tate for years, pleading either seisin in demesne as of fee, or seisin as of fee, will be proper; but if the reversion depend on an estate of freehold, the words, "in his demesne," should be omitted; Plowd. 191. a. Co. Lit. 17. b. n. 1. see also Com. Dig. tit. Pleader, C. 35. Doc. Plac. 287. As to pleading a reversion in general, see 1 Saund. 234. n. 3, 4.

(c) As to the *Interesse termini*, see 1 Saund. 251. d. 1. ante, 204. n.(u). & Saund. 176. n. 5. 1 Saund. 196. Clit. Ent. 223.

DECLARATIONS IN COVENANT.

III. Estate and time of enjoyment of *tenant, of the interest in the term, to commence on the death of G H, then state the death of G H, the entry of C D as tenant, and the scisin of the reversion by A B, the plaintiff, and the rent in arrear, &c.*]

18. Remainder in fee in a copyhold.(d)

* 210

[*State the scisin of the lord, and that at a court-baron, &c. he granted*] the said tenements, with the appurtenances, to one *G H* for the term of his life, and the remainder thereof after the decease of the said *G H* to one **E F* and his heirs forever. By virtue of which said grant he the said *G H* entered into the said tenements, with the appurtenances, and was seised thereof in his demesne as of freehold, for the term of his life, at the will of the lord, according to the custom of the said manor, the remainder thereof belonging to the said *F F* and his heirs. And the said *G H* being so seised thereof, and the remainder thereof belonging to the said *E F* and his heirs as aforesaid, he the said *E F*, &c.

4. ESTATE AND NUMBER OF OWNERS.(e)

As to the number of owners. see 2 Bl. Com. 103. 175 to 195. An estate is in severalty, joint-tenancy, coparcenary, or in common.

19. An estate in severalty.

[*In all the foregoing precedents the estate having been described as in severalty, it will be merely necessary here to give the form of pleading(f) in the case of an estate in fee in the husband and wife, in right of the wife, when the wife survives, and which is as follows:*] And the said *E F*, and *G* his wife, being so seised of the said reversion as aforesaid, he the said *E F* afterwards, to wit, on, &c. at. &c. aforesaid, died, and the said *G* then and there survived him. Whereupon and whereby she the said *G* then and there became, and was, and still is, sole seised of the said reversion, with the appurtenances, in her demesne as of fee.(g)

(d) As to this precedent, see 1 seisin by survivorship in case of a joint-tenancy.

See the mode of pleading a remainder in fee of a freehold estate. 2 Saund. 235.

(e) 2 Bl. Com. 103.

(f) See the next form as to sole

(g) See this precedent, 1 Saund. 253. and as to the allegation of sole seisin in general, 2 Saund. 10. n. 14.

For that whereas before and at the time of the making of the indenture hereinafter mentioned, *E F* and *G H* were seised as joint-tenants in their demesne as of fee, of and in the tenements, with the appurtenances hereinafter mentioned to have been demised to the said *C D*, and being so seised thereof heretofore, to wit, on, &c. at, &c. by a certain indenture then and there made between the said *E F* and *G H* of the one part, and the said *C D* of the other part, the counterpart, &c. [*here set out the lease as usual, the reference to it, and the lessee's entry, and then state the death and survivorship as follows:*] And the said *C D* being so possessed of the said demised premises, with the appurtenances, for the said term so to him thereof granted as aforesaid. and the reversion thereof, after the expiration of the said term belonging to the said *E F* and *G H*, afterwards, and in the life-time of the said *G H* and during the said term, by the said indenture granted, to wit, on, &c. at, &c. the said *E F* died so seised of the said reversion of and in the said demised premises, with the appurtenances as aforesaid, and the said *G H* then and there survived him, whereupon and whereby the said *G H* then and there became and was sole(h) seised of the said reversion, of and in the said demised premises, with the appurtenances, in his demesne as of fee, and being so seised, &c.

17. Estate and number of owners.

* 211

20. Estate in joint-tenancy, and the death of one, and sole seisin of the survivor.

For that whereas before and at the time of the making of the indenture hereinafter mentioned. *E F* and *G H* were seised in their demesne as of fee. of and in the tenements, with the appurtenances hereinafter mentioned to have been demised to the said *C D* as daughters and co heirs(i) of one *J K*, deceased. And being so seised heretofore, to wit, on, &c. at, &c. by a certain indenture then and there made, &c. [*If the estate in coparcenary be stated derivatively from the father, it is described as follows:*] For that *whereas before and at the time of the making of the demise hereinafter mentioned, one *J K* was seised in his demesne as of fee, of and in the tenements, with

21. Estate in coparcenary.

* 212

(h) *Ante*, 210. and 2 Saund. 10. n. 14. coheirs; but according to Co. Lit. 163, 164. and 2 Bl. Com. 187. all parceners make but one heir.

(i) In 1 Saund. 255. and Winch. 1163. the parceners are described as

*IV. Estate
and number of
owners.*

the appurtenances hereinafter mentioned to have been demised. And being so seised, he the said *J K* heretofore, to wit, on, &c. at, &c. by a certain indenture then and there made, &c. [*Here set forth the demise to C D the defendant, the covenants, the reference to the lease, and the lessee's entry, and then state the death of the lessor, and descent to the coparceners, as follows:*] And the said *C D* being so possessed of the said tenements, with the appurtenances, and the reversion thereof, after the expiration of the said term, belonging to the said *J K* and his heirs, he the said *J K* afterwards, to wit, on, &c. at, &c. died so seised of the said reversion as aforesaid; whereupon and whereby the said reversion of and in the said tenements, with the appurtenances, descended and came to the said *E F* and *G H* as daughters and coheirs of the said *J K*. Whereupon and whereby the said *E F* and *G H* then and there became, and were, and still are seised of the said reversion of and in the said tenements, with the appurtenances, as of fee.

*29. Tenancy
in common.
(k)*

For that whereas before and at the time of the making of the indenture of demise hereinafter mentioned, one *E F* was seised in his demesne as of fee, of and in one undivided moiety, the whole into two equal moieties, to be divided, of and in the tenements, with the appurtenances hereinafter mentioned to have been demised to the said *C D*. And one *G H* was also then seised in his demesne as of fee, of and in the other undivided moiety, of and in the same tenements, with the appurtenances, to wit, at, &c. And thereupon heretofore, to wit, on, &c. at, &c. [*Here state the lease by both tenants in common.*]

(k) See the precedent, Winch. 289. As to joinder or severance in 1163. how to describe the demand, action, 5 T. R. 246. *de una medietate* of the rent, Carth.

*5. THE TITLE, AND HOW ACQUIRED.

[State the seisin of the lessor and the lease, as ante, 200. and the lease's entry, and then proceed as follows:]

And the said *CD* being so possessed as aforesaid, and the said *EF* being so seised of the said reversion as aforesaid, he the said *EF* afterwards, to wit, on, &c. at, &c. aforesaid, died so seised of the said reversion of and in the said demised tenements, with the appurtenances as aforesaid. Whereupon and whereby the said reversion of and in the said tenements, with the appurtenances, then and there descended and came to the said *AB*, as son and heir of the said *EF* deceased, and thereby he the said *AB* then and there became, and was, and still is, seised of the same reversion of and in the said tenements, with the appurtenances, in his demesne as of fee.

23. Title to the entirety by descent in fee. (l)

* 214

*And the said *EF* being such rector as aforesaid, and so seised as aforesaid, he the said *EF*, afterwards and during the

24. By succession of a rector on death. (m)

(l) It must in covenant by an heir on the lease of his ancestor, be shewn that the lessor was seised in fee, Gilb. Debt, 408, 409, 410. As to pleading title by descent in general, see 2 Bl. Com. 200 to 240. Com. Dig. Pleading, 2 E. 1, 2. Vin. Abr. Heir. See the precedent, Co. Ent. 708. b. 2 Saund. 418. As to pleading a descent in tail, 1 Saund. 255. The like as coheirs, id. ibid. and ante, 211. It may be pleaded that *H* is heir to *A*, without saying either that *A* is dead, or had no son, 2 Saund. 305. a. n. 13. 2 Lut. 1172. It must be shewn how the plaintiff is heir, whether as son or daughter, grandson cousin, &c. 2 Saund. 45. a. 5 East, 272. 1 Salk. 355. and that he was heir to the person last seised, Co. Lit. 11. b. Vin. Abr. Heir, L. pl. 14, 15. In 3 B. & P. 453. it was decided, that in a count on a writ of right, it is not sufficient to state that the lands descended to four women, "as nieces and coheirs of *J. S.*" without shewing how they were nieces. And in pleading title as heir to an uncle, he must shew how,

and make the father a medium, viz. that the inheritance descended to him *ut consanguineo et heredi*, viz. son of such a one who is brother and heir to the uncle; 12 Mod. 619. And so in case of a descent from the grandfather, viz. as son and heir to the father, who was son and heir to the grandfather, 12 Mod. 619. But between two brothers, a descent is *immediate*, and title may therefore be made by one brother, or his representatives, to or through another brother, without mentioning their common father; and the son of one brother may claim as cousin and heir to the son of the other brother, without naming the grandfather, thus: "as son of Francis, who was the brother of John, who was the father of Matthew;" 2 Bl. Com. 226. Vin. Abr. Heir, L. 1. pl. 18. &c. 5 East, 272.

(m) As to the statement of a freehold in right of a rectory, ante, 203. This concise mode is adopted in actions on the case for dilapidations.— See also Mallory, tit. *Quare Impedit*, F. 1. &c. 3 B. & P. 444.

*V. The title,
and how ac-
quired.*

continuance of the said term, to wit, on, &c. at, &c. died, and thereupon afterwards and during the continuance of the said term, to wit, on, &c. at, &c. the said *A B* was in due form of law presented to the said rectory, and lawfully instituted and induced into the same. Whereupon the said *A B* then and there became, and was, and still is, rector of the said rectory, and the lawful successor of the said *E F* therein; and the said *A B* as such rector as aforesaid, then and there became, and from thence hitherto hath been, and still is, seised in his demesne as of freehold, in right of his said rectory, of and in the said premises in the said indenture mentioned, to wit, at, &c.

*25. By mar-
riage.(n)*

And the said *C* being so seised of and in the said reversion in the said demised tenements, with the appurtenances as aforesaid, she the said *C* afterwards, to wit, on, &c. at, &c. aforesaid, took to her husband *A B*, by virtue whereof the said *A B* and *C* then and there became, and were seised of the said tenements, with the appurtenances, in their demesne as of fee, in right of the said *C*.

*26. Feoff-
ment.(o)*

And the said *E F* being so seised as aforesaid, he the said *E F* afterwards, to wit, on, &c. at, &c. enfeoffed the said *A B* of the said tenements, with the appurtenances. To have and to hold the same to the said *A B* and his heirs and assigns, to the use of the said *A B*, his heirs and assigns for ever. By *virtue of which said feoffment he the said *A B* then and there became and was seised of and in the said tenements, with the appurtenances in his demesne as of fee. And being so there-
of seised, &c.

* 215

(n) See the precedent, 1 Saund. 253. Pleading a seisin in fee tail in husband and wife, by marriage, 1 Saund. 255. 2 Rich. C. P. 350, 351. Seisin in fee in right of the wife, *ante*, 201. Tenancy by courtesy by husband's surviving, *ante*, 203. Sole seisin in wife by her surviving *ante*, 210.

(o) See the precedents, 2 Saund. 9. 20. and the law as to feoffments, 2 Bl. Com. 310 to 316. A feoffment is not pleaded by deed, 2 Saund. 9. n. 13. And therefore no profit thereof need be made; and the statute of frauds, 29 Car. II. c. 3. which requires that livery should be accompanied by some instrument in writing, has not altered the form of pleading, 3 T. R. 156. 1 Saund. 9 a. n. 1. A livery of seisin on the feoffment needs not be stated in pleading; Co. Lit. 303. b. 2 Saund. 305. a. n. 13. 1 Saund. 228. b. As to the distinctions between a gift of real property and a feoffment, see 2

For that whereas heretofore, to wit, on, &c. at, &c. by a certain indenture then and there made between *E F* of the one part, and the said *A B* of the other part, (which said indenture sealed with the seal of the said *E F*, the said *A B* now brings here into court, the date whereof is the day and year aforesaid,) the said *E F* did demise, lease, set, and to farm let, (g) unto the said *A B*, his executors, administrators and assigns, a certain messuage or dwelling-house, &c. situate, &c. (except as in the said indenture, is excepted.) To have and to hold the said messuage or dwelling-house, &c. with the appurtenances, (except as aforesaid,) unto the said *A B*, his executors, administrators and assigns, from the — day of —, then last past, to the full end and term of — years thence next ensuing, and fully to be complete and ended. [*Here set out any parts of the lease that may be applicable to the case.*] As by the *said indenture reference being thereunto had will (amongst other things) more fully and at large appear. By virtue of which said demise the said *A B* afterwards, to wit, on, &c. entered(r) into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof for the said term so to him thereof granted as aforesaid. And being so possessed, &c.

F. The title, and how acquired.

27. By lease. (p)

* 216

By virtue of which said demise, he the said *E F*, afterwards, to wit, on, &c. aforesaid, entered into and upon all and

28. Assignment of a term to the plaintiff. (s)

Bl. Com. 316, 317. As to the mode of pleading a *grant*, *id.* 317. 2 Saund. 296. 297. 327, 328. n. 12.

(p) 2 Bl. Com. 317 to 323. Demise by the king by indenture enrolled, &c. 1 Saund. 187. When a tenant for life, and the remainder-man in fee, join in making a lease, it should not be pleaded as a joint lease by both in its inception, for living the tenant for life, it is only *his lease*, and the *confirmation* of the remainder-man; Cases and Opinions, vol. 2. 148. edit. *A. D.* 1791. 6 Co. 14. b. 15. a. 2 Bl. Com. 325. If the lease, or any other plead a demise by

husband and wife, it is not necessary to plead it to have been by deed; 2 Co. 61. b. Sav. 111. Dyer, 91. b. Cro. Eliz. 438. 482. or that any rent was reserved, Cro. Eliz. 112. And as to pleading a lease by husband and wife in general, see 2 Saund. 180. b.

(q) These are the words usually adopted, 1 Saund. 187.

(r) It is not necessary to state the entry, 1 Saund. 203. n. 1. As to the *interesse termini*, *ante*, 204. n. (n). 209. n. (c). Possession of a term, 2 Saund. 21. *Ante*, 204.

(s) 2 Bl. Com. 326. See *ante*, 204. In an action by the assignee of the

7. The title, and how acquired.

*

* 217

singular the said demised tenements, with the appurtenances, and became and was possessed thereof for the said term so to him thereof granted as aforesaid. And the said *E F* being so possessed thereof, he the said *E F*, afterwards, to wit, on, &c. at, &c. aforesaid, by his certain deed-poll indorsed on the said indenture, and duly signed by him, and sealed with his seal, and which the said *A B* now brings here into court, the date whereof is the day and year last aforesaid, he the said *E F*, for the considerations therein mentioned, did bargain, sell, assign, transfer and set over, unto the said *A B*, his executors, administrators and assigns. [*Here set out the operative words of the deed of assignment.*] As by the said deed-poll reference being thereunto had will more fully appear. By virtue of which said deed-poll, the said *A B* afterwards, to wit, on &c. last aforesaid, at, &c. aforesaid, became and was, and from thence hitherto hath been, and still is, possessed of the said *tenements, with the appurtenances, for the residue of the said term so thereof granted as aforesaid. And although, &c. [*Aver plaintiff's general performance of the lease since the assignment to him of lessee's interest.*]

29. Surrender of a leasehold interest. (i)

And the said *E F* being so possessed of the said demised tenements, with the appurtenances, as aforesaid, he the said *E F*, after the making of the said indenture, and during the continuance of the said term thereby granted, to wit, on, &c. at, &c. aforesaid, did surrender to the said *G H* the said term of years of him the said *E F*, then to come and unexpired, of

reversion, or by the assignee of the tenant, he must state the operative part of the deed of assignment, &c. and all mesne assignments, by virtue of which he is entitled to sue; 1 Saund. 112. b. n. 1. 234. n. 3. but the assignee of a term needs not shew the assignment to have been by deed, or in writing, under the statute 29 Car. II. c. 3. s. 3. And where the title is doubtful, or the assignments have been lost, 2 Bl. Rep. 1228. It is advisable not to refer to the deeds of assignment, 1 Saund. 234. n. 3. 276. n. 1, 2. A more concise form may

be adopted *against* an assignee, *ante*, 190. n. (x).

(i) See the precedent, 1 Saund. 235. 2 Saund. 22. 2 Bl. Com. 326. As to what operates as a surrender, and the mode of pleading it, see 1 Saund. 235. c. n. 9. 6 East, 86. Com. Dig. Surrender, N. Though since the statute against frauds, a surrender not merely by operation of law, must be in writing, yet in a declaration it is not necessary to allege that it was in writing, though it may be necessary in a plea, 1 Saund. 276. n. 1, 2.

and in the said demised tenements, with the appurtenances, and all his estate, right, title and interest, of and in the same; which said surrender he the said *G H* then and there accepted.

V. The title, and how acquired.

And the said *E F* being so seised, afterwards, to wit, on, &c. at, &c. by his certain writing, then and there made by him the said *E F*, and sealed with his seal, the date whereof is the day and year aforesaid, he the said *E F*, for and in consideration of the natural love and affection which he the said *E F* bore for the said *A B*, then and there being his cousin, did covenant for himself and his heirs, to and with the said *A B* and his heirs, that he the said *E F* and his heirs, then and from thenceforth for ever, did, would and should, stand and be seised of the said (or of the said reversion of and in the said) demised tenements, with the appurtenances, to the use of the said *A B*, his heirs and assigns forever, whereupon and whereby according to the form and effect of the said deed and of the said covenant of the said *E F*, and by force of the statute for transferring uses into possession,^(u) he the said *A B* then and there became and was seised of and in the said demised tenements, with the appurtenances, (or "of the said reversion") in his demesne as of fee, and being so seised, &c.

* 218

And the said *E F* being so seised, afterwards, to wit, on, &c. at, &c. by a certain indenture of bargain and sale then and there made between the said *E F* of the one part, and one *G H* of the other part,^(y) and sealed with the seal of the said *E F*, and bearing date the day and year aforesaid, and which said indenture of bargain and sale was afterwarde and within

31. Bargain and sale enrolled.^(x)

(u) As to this conveyance, see 2 Bl. Com. 338. and as to pleading it, 2 Saund. 97. b. c. Lutw. 1207. Carth. 307. 3 Lev. 370.

(v) See *post*, 219. n. (c).

(x) The nature of this conveyance is described in 2 Bl. Com. 338. and 1 Saund. 251. n. 2. see the precedents, 1 Saund. 251, 252, 256. 2 Saund. 275—297. c. *Id.* 11. The bargain and sale, (with the exception of a profert thereof, which was unnecessary, see below,) was in Outrain and Morewood, 3 East, 346. pleaded as in this precedent.

(y) It is not necessary to make a profert of deeds, operating under the statute of uses, 8 T. R. 573. 1 Saund. 9. n. 1.

V. The title, and how acquired.

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six months next after the date thereof, to wit, on, &c. in due manner enrolled in the high court of chancery of our lord the now king, at *Westminster*, in the county of *Middlesex*, according to the form of the statute in such case made and provided, (z) he the said *E F* for and in consideration of a certain sum of money, to wit, the sum of — *l.* (a) therefore then and there paid by the said *G H* to the said *E F*, did bargain and sell (b) to the said *G H*, amongst other things, the said demised premises, with the appurtenances. To have and to hold the same to the said *G H*, his heirs and assigns, to the only proper use and behoof of him the said *G H*, his heirs and assigns forever. As by the said last-mentioned indenture reference being thereunto had, will (amongst other things) more fully and at large appear. By virtue of which said bargain and sale, and enrolment, and by force of the statute for transferring uses into possession, (c) he the said *G H* then and there became and was seised of the reversion of the said demised premises, with the appurtenances, as of fee, and the said *G H* being so seised, &c.

32. Lease and release. (d)

And the said *E F* being so seised (or so seised of the said reversion) as aforesaid, afterwards, to wit, on, &c. at, &c. aforesaid, by a certain indenture of bargain and sale, then and there made, between him the said *E F* of the one part, and the said

(z) By 27 Hen. VIII. c. 16. bargains and sales shall not enure to pass a freehold, unless the same be made by indenture, sealed and enrolled within six months after the date thereof, in one of the courts at *Westminster*, or with the Custos Rotulorum of the county, 2 Bl. Com. 338. 1 Saund. 251. n. 2. It is necessary to shew in what court the deed is enrolled, 1 Saund. 251. n. 3. Com. Dig. Bargain and Sale, b. 12. This regulation does not extend to *London*, &c. Com. Dig. Bargain and Sale, b. 5.

(a) In pleading a conveyance under the statute of uses, it is necessary in all cases (except in the instance of a covenant to stand seised, *ante*, 217.) to state that a valuable con-

deration was paid. Com. Dig. Bargain and Sale, B. 12. 1 Mod. 263. 2 Saund. 12. n. 20. *Ante*, vol. 1. tit. Declarations.

(b) The operative words are so pleaded in 2 Saund. 275. which is more correct than the form in 1 Saund. 251. See also 2 Saund. 97. a.

(c) The 27 Hen. VIII. c. 10. is always called in pleading "the statute for transferring uses into possession," 1 Saund. 251. n. 2. 2 Saund. 97. c.

(d) 2 Bl. Com. 339. See precedents, 2 Saund. 10. 275. *Lutw.* 367. As to the mode of pleading the lease for a year, see 2 Saund. 10. n. 15. Lease by husband and wife, 2 Saund. 180. b.

A B of the other part, (c) be the said *E F* for and in consideration of a certain sum of money, to wit, the sum of 5s. then and there therefore paid by the said *A B* to the said *E F*, did bargain and sell the said (or the said reversion of and in the said) demised tenements, with the appurtenances, to the said *A B* to have and to hold the same to the said *A B*, his executors, administrators and assigns, from the day next before the day of the date of the said last-mentioned indenture, for the term of one whole year from thence next ensuing, and fully to be complete and ended. As by the said indenture reference being thereunto had, will (amongst other things) more fully and at large appear. By virtue of which said last-mentioned indenture, *and by force of the statute made for transferring uses into possession, (f) the said *A B* then and there became and was possessed of the said tenements, with the appurtenances, for the said term so to him thereof granted, as aforesaid, (or if the conveyance was of a reversion expectant on the expiration of a lease for years, insert after the word "possession," as follows: "the said reversion of and in the said demised tenements, with the appurtenances, became and was vested (g) in the said *A B*, for the said term so to him thereof granted as aforesaid,") the reversion (or if expectant on a lease, "the further reversion") thereof, with the appurtenances belonging to the said *E F*, his heirs and assigns. And the said *A B* being so interested as aforesaid, and the said further reversion thereof belonging as aforesaid, and the said *C D* being so possessed of the said demised premises for the residue of the said term so to him thereof granted as aforesaid, afterwards, to wit, on, &c. at, &c. aforesaid, by a certain indenture of release then and there made between the said *E F* of the one part, and the said *A B* of the other part, he the said *E F* for and in consideration of a certain sum of money, to wit, the

V. The title, and how acquired.

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Release (h).

(c) No profit should be made of 149. tit. Reversion, edit. 1791, as to the lease or release, *ante*, 218. n. (y). the effect of a conveyance by lease

(f) This allegation in the old way and release of a reversion expectant of pleading, was omitted, but it is on a term, and the mode of pleading now always inserted, 2 Saund. 10. n. such conveyance, and see Co. Lit. 15. *Ante*, 219. n. (c). 270. a. n. 3.

(g) See the opinion of Mr. Booth, (h) See the precedents, 2 Saund in Cases and Opinions, vol. 2. 143 to 11. 276, 277. Latw. 568,

V. The title, and how acquired.

sum of —*l.* then and there paid to him by the said *A B*, did grant, bargain, sell, alien, release and confirm,⁽ⁱ⁾ unto the said *A B* and his heirs, the said demised premises with the appurtenances, to have and to hold, &c. [*Set out the habendum as in the deed.*] By virtue of which said last-mentioned indenture, and by force of the statute made for transferring uses into possession,^(k) afterwards and during *the continuance of the said term by the said first-mentioned indenture granted, to wit, on, &c. aforesaid, at, &c. aforesaid, he the said *A B* became, and was, and from thence hitherto hath been, and still is, seised in his demesne as of fee, (*or of and in the said reversion,*) of and in the said demised tenements, with the appurtenances.

* 221.

33. By a private act of parliament.
(l)

For that whereas heretofore, to wit, on, &c. at, &c. by a certain act of parliament made in the 47th year of the reign of his present majesty, intituled, &c. after reciting that, &c. it was, amongst other things, enacted, &c. [*here set forth the material clauses.*] As by the record of the said act of parliament remaining amongst the rolls of the parliament of our lord the now king, at *Westminster*, in the county of *Middlesex*, may more fully and at large appear.

34. By lease, &c. from the king, with protest of exemplification of the enrolment of the letters patent.
(m)

[*State the seisin of the king as ante, 201. and then proceed as follows:*] And being so seised thereof, the said late king afterwards, to wit, on, &c. in the — year of his reign, by his certain indenture sealed with his great seal of *England*, made between the said late king and one *E F*, and in due manner enrolled of record, in the court of chancery of the said late king, at *Westminster*, demised, granted, and to farm, let, &c. [*here set out the demise, &c.*] As by the said indenture, (an exemplification of the enrolment whereof sealed under the said late

(i) As to the proper words to be here inserted, see 2 Saund. 97. a. b. c. and the precedents, *id.* 11. 376, 377.

(k) *Supra*, note (f). *Ante*, 219. n. (c).

(l) 2 Bl. Com. 344, 345. As to pleading a private act of parliament, see Bac. Abr. tit. Statute, L. Bull.

N. P. 224. Precedent, 1 Saund. 193. The defendant is not entitled to oyer, Doug. 476, 477. 1 Saund. 9. n. 1. b.

(m) As to pleading leases or other grants from the king, which are always matter of record, see 2 Bl. Com. 346. 1 Saund. 139. Com. Dig. tit. Patent.

king's great seal of *England*, the date whereof is at *Westminster*, the — day of —, in the — year of the reign, &c. the said *A B* according to the form of the statute(n) in such case made and provided, brings here into court) more fully appears. By virtue, &c. [*State lessee's entry, &c.*]

V. *The title, and how acquired.*

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*And the said *E F* and *G* his wife, being so seised,(h) afterwards, and during the continuance of the said demise, to wit, in *Hilary* term,(g) in the — year of the reign of our sovereign lord the now king, a certain fine was duly had and levied in his said majesty's court of the bench at *Westminster*, in the county of *Middlesex*, before(r) —, then his majesty's justices of the bench aforesaid, and other faithful subjects of our said lord the king, then there present, between the said *A B*, by the name of —, complainant, and the said *E F* and *G* his wife, by the names of, &c. deforciant, amongst other things, of the said demised tenements, with the appurtenances, by the name and description of, &c. whereupon a certain plea of covenant,(s) was summoned between them in the same court, to wit, that the said *E F* and *G* acknowledged the said tenements with the appurtenances, to be the right of him the said *A B* as those which the said *A B* had of the gift of the said *E F* and *G* and the same remitted and quitted claim from them the said *E F* and *G*, and the heirs of her the said *G*,(t) to the said *A B* and his heirs for ever.(u) And further the said *E F* and *G* grant-

35. By fine, levied by husband and wife, of the inheritance of the wife.(s)

(n) 3 & 4 Edw. VI. c. 4. explained by 13 Eliz. c. 6. As to the necessity for a profert of the exemplification, see 1 Saund. 189. n. 2. but the defendant is not entitled to oyer, though pleaded with profert, 1 T. R. 149. 1 Saund. 9. n. 1. b.

(o) As to the fine and the effect of it, 2 Bl. Com. 348. 357. 1 Saund. 319. n. 1. See the form of a fine, 2 Bl. Com. App. No. 4. See the precedents, 2 Saund. 175. 269, 270. 1 Saund. 258. Co. Ent. 700. Clift. 819. pl. 5. 1 Leon. 255. 2 Rich. C. P. 351. This form was adopted in 3 East, 346.

(p) It is not in general necessary to allege a seisin in fee, 2 Saund. 175. n. 1. 1 Leon. 255. See a state-

ment of seisin in fee in right of the wife, 2 Saund. 269.

(q) The term must be shewn and in what court the fine was levied, 2 Saund. 175. n. 2.

(r) It appears advisable to state the names of all the judges, 2 Saund. 175. n. 2.

(s) 2 Rich. C. P. 352. 2 Saund. 270.

(t) In, 2 Saund. 270. it is stated, "the heirs of the husband," but this is inaccurate, when the estate is the inheritance of the wife, 2 Saund. 176. n. 3. 2 Rich. C. P. 352.

(u) If a less estate, see 2 Saund. 175.

F. The title, and how acquired.

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36. The like, with proclamations.

37. Deed to lead the uses of recovery, and recovery accordingly.
(z)

ed for themselves, and the heirs of the said *G* that they would warrant to the said *A B* and his heirs, the tenements aforesaid, with the appurtenances, against all men for ever. As by the record of the said fine remaining in the said court of the bench aforesaid, more fully appears ;(x) which said fine so had *and levied as aforesaid, was had and levied to the use and behoof of the said *A B* and his heirs and assigns for ever, to wit, at, &c. aforesaid. By virtue(y) of which said fine the said *A B* then and there became and was seised of the said tenements, with the appurtenances, in his demesne as of fee.

See the precedent, 1 *Saund.* 259. As to the pleading a fine with proclamations as a bar to the issue in tail, and in general when such proclamations are necessary, and how they are to be pleaded, see 1 *Saund.* 259. n. 8. 2 *Saund.* 175. n. 3, 4. See the form, 2 *Bl. Com. App.* No. 4.

And the said *C D* further says, that before the said several times, when, &c. in the said first count mentioned, and at the several times hereinafter mentioned, one *E F* as heir at law of *G H*, deceased, was seised in his demesne as of fee, of and in the manor of, &c. with the appurtenances, in the county aforesaid. And being so seised thereof, he the said *E F* heretofore, to wit, on, &c. at, &c. aforesaid, by his certain indenture of bargain and sale, bearing date the day and year last aforesaid, and made between the said *C D*, the now defendant of the first part, the said *E F* of the second part, *J K* of the third part,

(x) A reference to the record of the fine, or of proclamations, is unnecessary, 2 *Saund.* 176. n. 4.

(y) As to this statement, 2 *Rich. C. P.* 352. 2 *Saund.* 270. 176. and as to the statement of a deed to lead the uses of the fine, see the following precedent of a recovery, and see the statement of a deed to declare the uses of the fine, 2 *Saund.* 270.

(z) The recovery is pleaded in this precedent more concisely than is usual. See the next precedent. The above form in a plea was advised by a very eminent pleader, in preference to the more prolix statement—he

pleaded it thus in a special verdict, and the court expressed their approbation of it. The recovery is in this case merely inducement to shew that *C D* was tenant for life. See the form of a recovery with single vouchers, and writ of seisin thereon, 2 *Saund.* 89. &c. and one with double voucher, 2 *Bl. Com. App.* No. 5. which will assist in framing the statement of a recovery. See the nature of a recovery defined, &c. *Wilkes*, 451. 2 *Saund.* 42. n. 7. 2 *Bl. Com.* 357. See the precedents, *Winch. Ent.* 1139. 2 *Lutw.* 1541. *Clift.* 814. pt 3.

N O of the fourth part, and *P Q* of the fifth part; which said indenture bearing date the day and year aforesaid, was then and there sealed with the seal of the said *E F*, and was within six months then *next following, to wit, on, &c. in due manner enrolled in the high court of chancery of our said lord the king, according to the form of the statute in such case made and provided, in consideration of the sum of 5*s.* of lawful money of *Great Britain*, to him the said *E F* in hand then and there paid by the said *N O*, he the said *E F*, at the request and by the direction and appointment of the said *J K*, testified as therein mentioned, did bargain and sell, and the said *J K* did grant, bargain and sell, and confirm unto the said *N O* (amongst other things) the said manor of, &c. with the appurtenances, in the county aforesaid. To have and to hold the same to the said *N O*, and his heirs and assigns, to the use and behoof of the said *N O*, and his heirs and assigns for ever, to the intent and purpose that the said *N O* might become perfect tenant of the freehold of the said manor with the appurtenances. And it was thereby agreed that the said *P Q* should, before the end of that present *Easter* term, or of some other subsequent term, sue forth a writ of entry against the said *N O* in order to have a recovery suffered of the manor of, &c. *sur disseisin en le foot*. And that the said recovery when suffered should be and enure to the use of the said *C D*, the now defendant, and his assigns, for and during the term of his natural life, and the remainder thereof to the use of the said *J K*, his heirs and assigns for ever. And the said *C D* further says, The recovery
ry.
that afterwards, to wit, in — term, in the — year of the reign of our lord the now king, a writ of entry *sur disseisin en le foot* was sued out, and a common recovery in due form of law suffered, of the said manor, with the appurtenances, in pursuance of the said indenture, wherein the said *P Q* was demandant, against the said *N O* tenant, and the said *N O* vouched to warranty the said *C D*. (the now defendant,) who appeared and vouched to warranty the said *J K*, who appeared and vouched to warranty —, the common vouchee, and a writ of seisin was thereupon awarded to the said *P Q*, and the sheriff of the same county returned the same writ executed. As by the record and proceedings thereof remaining *in the court of our said lord the king, of the bench here, to wit, at *Westminster*,
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V. The title, and how acquired. more fully appears. And the said *C D* further saith, that the said *J K*, and all those whose estate he now hath, and at the said several times when, &c. had of and in the said manor with the appurtenances, from time whereof the memory of man is not to the contrary, have had, and have used, and been accustomed to have, and of right ought to have had, and the said *C D* who is so seised of the said manor, with the appurtenances, for the term of his life as aforesaid, still of right ought to have, &c. [*Here the subject matter of the prescription was stated.*]

The like more fully pleaded. (a)

[*After stating that R H and M by fine became seised, proceeded as follows:*] And the said *R H* and *M* being so seised, *N Z* and *J M* afterwards, to wit, in the same term of *Saint Michael*, in the — year of the reign aforesaid, in the said court of the bench, before —, and his companions, justices of the bench aforesaid, impleaded the said *R H* and *M* in a plea of land of the aforesaid manor and tenements (amongst other things) by writ of the said lady the queen, of entry, upon *disseisin en le foot*, in the same court then returnable and duly returned, and the said *R H* and *M*, and *N Z* and *J M*, parties to the said writ in the said court in due manner appearing, and the said *R H* and *M* so being seised of the said manor and tenements, with the appurtenances, in their demesne as of fee as aforesaid, the said *N Z* and *J M* then declaring upon the said writ, in their proper persons demanded against the said *R H* and *M* the manor and tenements aforesaid, with the appurtenances, (amongst other things,) by the names and descriptions aforesaid, as their right and inheritance, and into which the said *R H* and *M* had not entry, unless after *the disseisin, of which *H H* thereof unjustly and without judgment had made to the said *N Z* and *J M* within thirty years then last past; and whereupon they said that they were seised of the manor and tenements aforesaid, with the appurtenances, in their demesne as of fee and right, in time

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(a) This precedent is precisely as *East*, 346. See the notes, *ante*, 223, pleaded in *Outram v. Morewood*, 3 224.

of peace, in the time of the said then queen, by taking the profits thereof, to the value of, &c. and into which, &c. and thereupon they brought suit, &c. And the said *R H* and *M*, in their proper persons, came and defended their right, when, &c. and thereupon vouched to warranty *J Z*, gentleman, son and heir apparent of the said *J Z*, esquire, which said *J Z* the son, present then in court, by *H M W*, esquire, his guardian, which said *H M W* was admitted by the said court of the said queen, to appear for the said *J Z* the son, being then under age, as the guardian of the said *J Z* the son, the manor and tenements aforesaid, with the appurtenances, to them warranted, &c. and thereupon the said *N Z* and *J M* demanded against the said *J Z*, tenant, by his own warranty, the manor and tenements aforesaid, with the appurtenances, in form aforesaid, &c. And whereupon they said that they were seised of the manor and tenements aforesaid, with the appurtenances, in their demesne as of fee, in time of peace, in the time of the said queen, by taking the profits thereof, &c. and into which, &c. and thereupon they brought suit, &c. And the aforesaid *J Z*, tenant, by his own warranty, defended his right, when, &c. and thereupon further vouched to warranty, *R H* who was present there in court, in his proper person, and freely, the manor and tenements aforesaid, with the appurtenances, to him warranted, &c. And thereupon, the said *N Z* and *J M* demanded against the said *R H*, tenant, by his own warranty, the manor and tenements aforesaid, with the appurtenances, in form aforesaid, &c. And whereupon they said that they themselves were seised of the manor and tenements aforesaid, with the appurtenances, in their demesne as of fee and right, in the time of peace, in the time of the said then queen, by taking the profits thereof, to the value, &c. and into which, &c. and whereupon they brought suit, &c. And the said *R H* tenant, by his own warranty, defended his right, when, &c. and said that the aforesaid *H H* did not disseise the aforesaid *N Z* and *J M* of the manor and tenements aforesaid, with the appurtenances, as the aforesaid *N Z* and *J M*, by their writ and count aforesaid above supposed, and of this he put himself upon the country; and the aforesaid *N Z* and *J M* thereupon craved leave to implead, and they had it; and afterwards the aforesaid *N Z* and *J M* came again there into court in that same term, in their

R. The title, and how acquired.

R H and *M* vouch *J Z* the son.

J Z the son, vouches *R H*.

* 227
R H defends.

*V. The title,
and how ac-
quired.*

Judgment.

Writ

Return.

*Uses of reco-
very.*

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proper persons, and the aforesaid *R H*, though solemnly called, came not again, but departed in contempt of the court, and made default. Therefore it was then considered that the aforesaid *N Z* and *J M* should recover their seisin against the aforesaid *R H* and *M* of the manor and tenements aforesaid, with the appurtenances, and that the aforesaid *R H* and *M* should have of the land of the said *J Z* the son, to the value, &c. and that the said *J Z* the son, should further have of the land of the said *R H* to the value, &c. and the said *R H*, in mercy, &c. And thereupon the said *N Z* and *J M* prayed a writ of the lady the queen, to be directed to the sheriff of the county aforesaid, to cause them to have full seisin of the manor and tenements aforesaid, with the appurtenances, and it was granted to them, returnable there, on, &c. At which day came there in court, the aforesaid *N Z* and *J M* in their proper persons, and the sheriff, to wit, —, esquire, then returned that he by virtue of the writ aforesaid to him directed, on, &c. then last past, did cause the said *N Z* and *J M* to have full seisin of the manor and tenements aforesaid, with the appurtenances, as by that writ he was commanded, &c. As by the record and process thereof in the court of our said lord the king, of the bench, at *Westminster*, now remaining appears. Which said recovery as to the coals and iron-stone being within or under any part of the said lands and tenements in, &c. (except the coals and iron-stone being *within or under any of the messuages, buildings, orchards and gardens, which were then standing and being upon any of the said lands or tenements,) with free liberty of ingress and egress into the said premises, in places convenient for the getting and digging for the same coals and iron-stone, and for the stacking the same in places near where the same should be gotten, until they might conveniently be sold, or carried away, off and from the said premises, was had and suffered, to the use of the said *J Z* the father, for and during the term of fourscore years, if he so long did live, the remainder thereof to the use of the said *J Z* the son, and to the heirs male of his body lawfully begotten, and to be begotten, and for default of such issue, to the use of the second, third, fourth, fifth, sixth, seventh and eighth son of the body of the said *J Z* the father, begotten or to be begotten severally and successively, one after another, according to se-

niority, and to the several and respective heirs male of the body of such sons respectively, and for default of such issue, to the use of the said *J Z* the son, and to his heirs for ever, to wit, at, &c. aforesaid. By virtue of which said recovery, and by force of the statute for transferring uses into possession, *J Z* the father, became possessed, amongst other things, of the said coals, with the liberties and appurtenances thereto belonging, for the term of fourscore years, if the said *J Z* the father, should so long live; and the said *J Z* the son, became seised thereof in his demesne as of fee-tail, the further remainder and reversion thereof belonging as before limited; and the said *J Z* the father being so possessed, he the said *J Z* the father, afterwards, to wit, on, &c. in, &c. to wit, at, &c. aforesaid, was created a knight by the said queen, which honour of knight-hood the said *J Z* the father, then and there accepted. And the said Sir *J Z*, afterwards, to wit, on, &c. in, &c. at, &c. aforesaid, died without any issue of his body, save the said *J Z* the son, and the said *J Z* the son, being so seised as aforesaid, *afterwards, to wit, on, &c. in, &c. at, &c. aforesaid, &c. [*Lease and release by the son.*]

F. The title, and how acquired.

Right of *J Z* the father, and seisin of the reversion in *J Z* the son, &c. by virtue of recovery.

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[*As to the statement of the premises being copyhold, and of the admission in fee, &c. of a lessor, &c. and of his seisin, see ante, 205, 206.*] And the said *E F* being so seised of the said customary tenement, with the appurtenances as aforesaid, he the said *E F* by —, his attorney, in that behalf duly authorised, at that same court, did afterwards, to wit, on the day and year last aforesaid, according to the custom of the said manor, in open court there, surrender to the hand of the said —, so then being lord of the said manor, by the hands and acceptance of the said deputy steward by the rod, the said customary tenement, with the appurtenances,† to the use(a) of such person and persons for such estate and estates therein, as he the said *E F* then already had, or thereafter should, in or by his last will and testament in writing, give, devise, direct, limit, or appoint the same, to wit, at the parish, &c. aforesaid. And the said *A B* further saith, that the said *E F* being so seised as

39. Surrender to the use of a will, with death of testator; presentment of his death and will and admission of devise.

(a) The uses are to be stated according to the effect of the surrender.

*V. The title,
and how ac-
quired.*

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aforsaid, afterwards and during the said term, to wit, on, &c. at, &c. aforsaid, he the said *E F*, at, &c. aforsaid, duly made and published his last will and testament in writing, signed by him the said *E F* and subscribed in the presence of the said *E F* by three credible witnesses,^(b) and thereby devised the said reversion unto, &c. [*State the terms of the devise.*] And the said *E F* afterwards, and during the said term, to wit, on, &c. at, &c. aforsaid, died so seised of the said reversion as aforsaid, without revoking his said will, and the said *A B* further saith, that after the death of the said *E F*, and during the continuance of the said term, to wit, at a general court-baron of —, then lord of the said manor, holden in and for the said manor, *on, &c. before^(c) —, his steward of the court of the said manor, the homage of the said last-mentioned court then and there presented that the said *E F* died seised to him and his heirs of the reversion of and in the said customary tenement, with the appurtenances. And also then and there presented that since the last court the said *E F* died seised of the said reversion of the said customary tenement, with the appurtenances. And also then and there presented the said last will and testament of the said *E F*. And thereupon the said *A B* came into the said court in his proper person, and prayed to be admitted to the said reversion of the said customary tenement, with the appurtenances, whereupon the lord of the said manor at the said court so holden as last aforsaid, by his said steward, granted the said reversion of and in the said customary tenement, with the appurtenances, to the said *A B* to hold to him the said *A B* and his assigns, for and during the term of his natural life, by copy of the court-roll, at the will of the lord, according to the custom of the said manor. And the said *A B* was then and there, according to the custom of the said manor, admitted^(d) tenant of the said reversion of and in the said last-mentioned tenements, with the appurtenances, in manner and form aforsaid. And thereupon the said

(b) This does not appear to be necessary—a will of copyhold not being within the statute of frauds; *Bar. Abr. Wills, D. 2. p. 316.*

(c) The name of the steward must be stated, *ante*, 206. n. (e).

(d) As to the statement of the admission, 1 *Saund.* 146, 147. *Vin. Abr. Copyhold, U. b. and ante*, 206.

A B then and there became and was seised^(e) of the said reversion of and in the said last-mentioned tenements, with the appurtenances, for the term of his natural life, at the will of the lord, according to the custom of the said manor. And the said *A B* being so seised, &c.

V. The title, and how acquired.

[*Same as the last form to the obelisk, and then proceed as follows:*] and the reversion and reversions, remainder and remainders thereof, and all the estate, right, title, interest, claim and demand whatsoever, either at law or in equity, of him the said *E F*, of, in, and to the same, and every part thereof, to the use and behoof of him the said *E F*, his heirs and assigns. Whereupon at that same court came the said *A B* and humbly prayed to be admitted tenant of the said customary tenement so surrendered by the said *E F* as aforesaid, to whom the said last-mentioned lord of the said manor, by the said last-mentioned deputy steward, then and there granted seisin thereof by the rod, to have and to hold the said customary tenement, with the appurtenances, to the said *A B*, his heirs and assigns for ever, to be holden of the said last-mentioned lord, by copy of court-roll, at the will of the lord, according to the custom of the said manor, and the said *A B* was then and there admitted^(g) tenant of the said customary tenement, with the appurtenances as aforesaid, and thereby then and there became, and was, and still is, seised in his demesne as of fee, of the said reversion of and in the said customary tenement, with the appurtenances, at the will of the lord, according to the custom of the said manor. And being so seised, &c.

40. Surrender to the use of a purchaser.

(f) * 231

And the said *E F* being so seised as aforesaid, he the said *E F*, afterwards, to wit, on, &c. at, &c. aforesaid, duly made and published his last will and testament in writing,⁽ⁱ⁾ bearing date, &c. and signed by him the said *E F*, and attested and

41. Title by devise, in fee simple. (h)

(e) As to the statement of an entry when necessary, *ante*, 206. n. (t). 1 Saund. 147. n. 2.

(f) See a precedent, 1 Saund. 146. 147. The uses are to be stated according to the effect of the surrender.

(g) See the precedent, 1 Saund.

146. Vin. Abr. Copyhold, U. b. *ante*, 226. n. (d).

(h) See the precedents, 2 Saund. 235, 236. 1 Saund. 253.

(i) The will must be shewn to have been made in writing, in pursuance of the statutes, 32 Hen. VIII. c. 1. and 34 Hen. VIII. c. 5. 1 Saund. 276. a. n. 2.

V. The title, and how acquired.

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subscribed in the presence of the said *E F* by three credible witnesses, according to the form of the statute in such case made and provided,^(k) and thereby (amongst other things) gave and devised the said demised premises, with the appurtenances, unto the said *A B* to *hold unto and to the use of the said *A B*, and his heirs and assigns for ever. And the said *E F* afterwards, to wit, on, &c. at, &c. aforesaid, died so seised of the reversion of and in the said demised premises, with the appurtenances as aforesaid, without altering his said will, as to his said devise of the said demised premises, with the appurtenances. Whereupon and whereby^(l) the said *A B* then and there became and was seised of the said reversion in his demesne as of fee. And being so seised, &c.

42. Title to a chattel real, by will.^(m)

And the said *C D* being so possessed of the said demised premises, with the appurtenances, and the said *E F* being so possessed of the said reversion, as aforesaid, afterwards and during the said term by the said indenture granted, to wit, on, &c. at, &c. the said *E F* duly made and published his last will and testament in writing, bearing date the same day and year last aforesaid, and thereby amongst other things, gave and bequeathed the said reversion of and in the said demised premises, with the appurtenances, unto the said *A B* and his assigns, and by his said will he the said *E F* then and there appointed *G H* executor thereof, and afterwards, to wit, on, &c. at, &c. he the said *E F* died so possessed of the said reversion of and in the said demised premises, with the appurtenances, without revoking or altering his said will with respect to the said bequest, after whose death, to wit, on, &c. at, &c. aforesaid, the said *G H* duly proved the said last will and testament, and took upon himself the burthen of the execution thereof.⁽ⁿ⁾ and then and there assented^(o) to the *said bequest of the said re-

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(k) 29 Car. II. c. 3. s. 5. but neither this nor the statute of wills need be referred to, Dyer, 85. b.

(l) No assent of the executor is to be stated in the case of a devise of a freehold interest, Co. Lit. 111. a. 1 Saund. 278. n. 5. 3 East, 120.

(m) This precedent is framed precisely as in the case of Mackay v. Mackreth, referred to ante, 205. See also 1 Saund. 278. 2 Saund. 21.

(n) It is necessary to state the proof of the will, 2 Stra. 716. See the precedent, 1 Saund. 106, 107.

(o) In the case of a bequest of a chattel real, the legatee must in pleading, aver the assent of the executor, which is necessary to vest the legal interest in him, see 1 Saund. 278. n. 5. *Supra*, n. (l).

version to the said *A B*, whereby the said *A B* became and was possessed^(h) of the said reversion of and in the said demised premises, with the appurtenances, to wit, at, &c. afore said. And being so possessed, &c

[Commencement as ante, 191. and note (c).]

For that whereas heretofore, to wit, on, &c. at, &c. by a certain indenture of apprenticeship^(r) then and there made, (one part of which said indenture, sealed with the seal of the said *C D*, the said *A B* now brings here into court, the date whereof is the same day and year aforesaid,) one *E F* did put himself apprentice to the said *A B*, to learn his art, trade and mystery of a —, and with him (after the manner of an apprentice) to serve from the date thereof unto the full end and term of seven years from thence next following, to be fully complete and ended, during which term it was thereby covenanted and agreed, that the said apprentice his said master faithfully should serve, his secrets keep, his lawful commands every where gladly do, and that he should not haunt taverns or playhouses, nor absent himself from his said master's service *day or night unlawfully, but in all things as a faithful apprentice should behave himself towards his said master, and all his, during the said term. And for the true performance by the

On apprentice deeds.

Against the father of an apprentice, for the apprentice absconding himself. ^(g)

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(p) *Ante*, 215, 216. and 2 Saund. 21.

(q) See the various precedents of declarations and pleas, by and against apprentices, indexed in 5 Went. 112. 132. An action of covenant cannot be supported against an infant apprentice. Cro. Car. 179. 6 T. R. 557. It should, therefore, be against the party who covenanted for the infant's due performance of the indenture. The usual words at the conclusion of the indenture amount to a covenant. Doug. 518. 8 Mod. 190. Com. Dig. tit. Covenant, A. 2. The binding

must be for seven years, and if it be for a less term, no action can be supported upon the indenture. 5 Eliz. c. 4. s. 41. 1 Anstr. 256, 257. The deed, however, is only voidable, and not absolutely void, 7 T. R. 310, 314. 1 Bott. 525. pl. 709. 530. pl. 717. 2 Bott. 377. pl. 404. And a stranger cannot take advantage of the objection, unless the parties to it have previously avoided it. Id. ibid. 2 H. Bl. 511. 2 Esp. Rep. 734.

(r) As to the binding by indenture, see 1 Nolan's P. L. 311. Co. Lit. 148. b.

In detinue.

said *E F* of all and every the covenants and agreements therein contained on the part and behalf of the said *E F* to be performed and fulfilled, the said *C D* thereby bound himself unto the said *A B*.(s) As by the said indenture, reference being thereunto had, will (amongst other things) more fully and at large appear. By virtue of which said indenture the said *E F* afterwards, to wit, on the said, &c. at, &c. aforesaid, entered, and was then and there received into the service of the said *A B* as such apprentice as aforesaid, and remained and continued in such service under, and by virtue of the said indenture, for a long space of time, to wit, from the day and year last aforesaid, until and upon, &c. to wit, at, &c. aforesaid. And although he the said *A B* hath always, from the time of the making of the said indenture, hitherto well and truly performed, fulfilled and kept all things therein mentioned and contained, on his part and behalf to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning thereof, the said *A B* in fact saith, that the said *E F* did not, nor would, faithfully serve the said *A B*, according to the tenor and effect, true intent and meaning of the said indenture; but on the contrary thereof, he the said *E F* during the said term, to wit, on, &c. at, &c. aforesaid, did unlawfully absent himself, and hath, from thence, hitherto remained and continued absent from the service of the said *A B* contrary to the tenor and effect of the said indenture, and of the said covenant of the said *C D* in that behalf made as aforesaid, and so, &c. [*Same conclusion as ante*, 194.]

(c) *Ante*, 233. n. (g). This amounts to a covenant, Doug. 518. 8 Mod. 199.

IV. DECLARATIONS IN DETINUE.

Markham and Le Blanc.

— next after —
in *Trinity Term*, 47 *Geo. III.*

— (b) (to wit.) *A B* complains of *C D* being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea, that he render to the said *A B* certain goods and chattels (or, “*deeds and writings*,” according to the fact) of great value, to wit, of the value of —*l.* of lawful, &c. which he unjustly detains from him. (c) For that whereas the said *A B* heretofore, to wit, on, (d) &c. at, (e) &c. delivered to the said *C D* certain goods and chattels, to wit, &c. (f) of the said *A B* of great value, (g) to wit, of the value of —*l.* of lawful money of, &c. to be redelivered by the said

First count on a bailment to redeliver on request. (a)

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(a) *Com. Dig. Pleader*, 2 *X. 2. Mode of Declaring*, New Rep. 140. See the precedents in detinue, 7 *Wentw.* 647. 3 *Wooddes.* 106. 1 *New Rep.* 140. *Willes*, 119. and in *trover*, *post.*

(b) The venue is transitory. *Com. Dig. Action*, N. 6. unless against justices of the peace, &c.

(c) In *C. P.* the form runs, “*C D* was summoned to answer *A B* of a plea that he render to the said *A B* certain goods or chattels (or *deeds and writings*) of great value to wit, &c. which he unjustly detains from him, and thereupon the said *A B* by *E F* his attorney, complains against the said *C D*, for that whereas,” &c.

(d) The day is not material, unless it constitute part of the contract.

(e) The venue being transitory, the precise place is immaterial.

(f) As to the certainty necessary in the description of the chattels, 2 *Saund.* 74. b. *Co. Lit.* 286. b. *Bac. Abr. Detinue*, B. *Com. Dig. Pleader*, 2 *X. 2.* The date of a deed, &c. needs not be stated, 1 *Wils.* 116.

(g) The declaration may mention the value of every particular, or of all in gross, *Com. Dig. Pleader*, 2 *X. 2.* and the latter is most usual. Formerly a distinction was taken as to price and value, in the description of *animate* and *inanimate* chattels. *Cro. Jac.* 130. but this is no longer attended to, *Bac. Abr. Trover*, F. F. N. B. 88. M. and value appears in all cases to be the preferable description.

In detinue.

Second count
on a supposed
finding. (j)

* 237

C D to the said *A B* when he the said *C D* should be thereunto afterwards requested; (h) yet the said *C D*, although he was afterwards, to wit, on, &c. at, &c. aforesaid, requested by the said *A B* so to do, (i) hath not as yet delivered the said goods and chattels, or any of them, or any part thereof, to the said *A B* but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, and still unjustly detains the same from the said *A B*, to wit, at, &c. aforesaid. And whereas also the said *A B* heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, was lawfully possessed of certain other goods and chattels, to wit, &c. of great value, to wit, of the value of —l. of like lawful money as of his own property, and being so possessed thereof, he the said *A B* afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, casually lost the said goods and chattels out of his possession, and the same afterwards, to wit, on, &c. aforesaid at, &c. aforesaid, came to the possession of the said *C D* by finding; (k) yet the said *C D* well knowing the said last-mentioned goods and chattels to be the property of him the said *A B*, and of right to belong and appertain to him, hath not as yet delivered the said last-mentioned goods and chattels, or any or either of *them, or any part thereof, to the said *A B*, although often requested so to do, but hath hitherto wholly refused so to do, and hath detained, and still doth detain the same from the said *A B*, to wit, at, &c. aforesaid. To the damage of the said *A B* of —l. (l) and therefore he brings his suit, &c.

(h) The contract of bailment must be truly stated; see the precedents, 3 Wooddes. 106. 1 New Rep. 140. Willes, 119.

(i) The precedents in 1 New Rep. 140. 3 Wooddes. 106. Willes, 119. do not state a special request; but in Willes, 118. 5 T. R. 409. this was objected to, and see the precedent in 7 Wentw. 635, 636, 637.

(j) Com. Dig. Plender, 2 X. 2. See the precedents, 1 New Rep. 140. Willes, 118. 4 T. R. 229. and the notes to the preceding count.

(k) This is not traversable, 1 New Rep. 140. but *quære*, if the defendant originally took the goods tortiously. Selwyn's N. P. 595. *Ante*, vol. 1. Index, tit. Detinue.

(l) As the judgment in this action is conditional to recover the specific chattel, or in case it be not forthcoming, damages for detaining the same, Cro. Jac. 682. Com. Dig. Plender, 2 X. 12. a sum should be here inserted to cover the real value.

—— (to wit.) *A B* complains of *C D* being, &c. of a plea, that he render to the said *A B*, the sum of —*l.* of lawful, &c. which he owes to, and unjustly detains from him, and also that he render to him, the said *A B*, a certain indenture of lease of him the said *A B*, bearing date, &c. which he unjustly detains from him ; for that whereas, [*here insert the counts in debt, and the conclusion, ut ante, 144. to the words " To the damage," &c. and then insert the counts in detinue for the lease, &c. as in the last precedent to the end, and conclude, " To the damage," &c.*] *In detinue.* Debt and detinue in the same declaration. (m)

*V. DECLARATIONS IN CASE.

* 238

Markham and Le Blanc.

—— next after ——,
in *Trinity Term, 47 Geo. III. (a)*

——, (to wit.) *A B* complains of *C D* being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea of trespass on the case, &c. For that whereas, &c. [*Here state the cause of action, and conclude as follows :*—To the damage of the said *A B* of —*l.*(b) and therefore he brings his suit, &c.

Beginning and conclusion of a declaration in case or trover in K. B.

Pledges, &c.

(m) That debt and detinue may be joined, see 2 Saund. 117. b. Bro. Joinder in Action, 97. and for the precedents, see Brownl. Red. 186. Rast, 150. When a defendant has in his possession, personal property, formerly of the plaintiff, and it be doubtful whether a contract by the defendant for the purchase thereof can be proved, it is advisable to insert a count in *debt* for goods sold, and another count in *detinue* for the chattel, in order that the plaintiff may recover on one ground or the other ; and many other cases may occur, in which this joinder of action may be advisable.

(a) As to the title, *ante*, 1. n. (a).

(b) A sum sufficient to cover the real damage.

In case.

In the Common Pleas.

— next after —
 in Trinity Term, 47 Geo. III.(c)

The like in
 C. P.

—, (to wit.) *C D* was attached to answer *AB* of a plea of trespass on the case, &c. and thereupon the said *AB* by *EF* his attorney, complains, for that whereas, &c. [*State the cause of action, and then conclude as follows:*]—wherefore, the said *AB* saith that he is injured, and hath sustained damage to the value of —*l.(d)* and therefore he brings his suit, &c.

I. FOR TORTS TO THE PERSON.

[Commencement as above.]

For keeping a
 dog used to
 bite mankind.
 (e)

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For that whereas the said *C D* heretofore, to wit, on, &c.(f) and from thence, for a long space of time, to *wit, until, and at the time of the damage and injury to the said *AB* as hereinafter mentioned, to wit, at, &c.(g) wrongfully and injuriously did keep a certain dog, he the said *C D*, during all that time, well knowing that the said dog then was used, and accustomed to attack and bite mankind,(h) to wit, at, &c. aforesaid, and which said dog afterwards, and whilst the said *C D* so kept the same as aforesaid, to wit, on, &c. aforesaid, at, &c. aforesaid, did attack and bite the said *AB* and did then and there greatly lacerate, hurt and wound, one of the legs of him the said *AB*.

(c) *Ante*, 1. n. (a).

(d) *Supra*, n. (b).

(e) As to the liability of the owner of animals for mischief done by them, see vol. 1. Index, Animals. See the precedents, 8 Went. Index, 23. Com. Dig. Pleader, 2 P. 2. Com. Dig. Action upon the Case for Negligence, A. 5.

(f) Any day just before the injury was committed.

(g) The venue is transitory.

(h) This scienter must be alleged and proved, Dyer, 25. b. 29. a. 2 Salk. 662. 2 Stra. 1264. 1 Ld Raym. 606. 12 Mod. 332. 1 Lutw. 90. Cro. Car. 487. What is sufficient evidence of the defendant's notice of the propensity, see 2 Stra. 1264. 2 Esp. Rep. 482. Com. Dig. tit. Action on Case for Negligence, A. 5. It may be advisable to add a count for not keeping the dog properly secured, 2 Esp. Rep. 482. or properly fed.

And thereby he, the said *A B*, then and there became, and was sick, sore, lame and disordered, and so remained, and continued for a long space of time, to wit, for the space of six months then next following, during all which time he the said *A B*, thereby suffered and underwent great pain, and was thereby then and there hindered and prevented from performing and transacting his lawful affairs and business, by him during that time to be performed and transacted; and also, by means of the premises, he, the said *A B*, was thereby then and there put to great expense, costs and charges, in the whole amounting to a large sum of money, to wit, the sum of —*l.* in and about endeavouring to be cured of the said wounds, sickness, lameness and disorder, so occasioned as aforesaid, and hath been, and is, by means of the premises, otherwise greatly injured and damnified, to wit, at, &c. aforesaid. To the damage, &c. [*Conclusion as ante*, 238.]

Keeping mischievous animals.

Pledges, &c.

* 240

[*Same as the last precedent to the obelisk.*]—to hurt, chase, bite, worry and kill *sheep and lambs*,^(k) which said *dog afterwards, to wit, on, &c. aforesaid, and on divers other days and times, between that day and the day of commencing this suit, to wit, at, &c. aforesaid, did hunt, chase, bite and worry divers, to wit, one hundred sheep and one hundred lambs of the said *A B* of great value, to wit, of the value of —*l.* there then found and being, by means whereof, divers, to wit, fifty of the said sheep, and fifty of the said lambs of the said *A B*, being of great value, to wit, of the value of —*l.* then and there died, and became of no value to the said *A B*, and the residue of the said sheep and lambs of the said *A B*, being also of great value, were then and there greatly terrified, damaged, and injured, and of

The like for keeping a dog accustomed to bite sheep or other animals.
(i)

(i) See the notes to the last precedent.

(k) See note *ante*, 238. n. (u). If there be no evidence of the defendant's having notice of the dog's propensity to kill the particular cattle which have been injured, it may be advisable to state what particular mis-

chief he had done before. 1 Lord Raym. 110. Salk. 13. or to state a propensity to injure animals in general, see 12 Mod. 335, 336. Lord Raym. 608. 1 Salk. 13. 2 Esp. Rep. 482. which would be sufficient, if not specially demurred to.

Consequences of nuisances. no use or value to the said *A B*, to wit, at, &c. aforesaid. To the damage, &c. [*Conclusion as ante*, 238.]

Against the occupier of a house adjoining a public street, for laying rubbish therein, whereby plaintiff was overturned in his carriage.
(1)

* 241

[*Commencement as ante*, 238.]—For that whereas the said *C D*, before, and at the time of the committing of the grievance hereinafter next mentioned, was possessed of a certain messuage, with the appurtenances, situate and being in a certain street, called, —, in the parish of —, in the county of —, which said street at the time of the committing of such grievance and from thence hitherto hath been, and still is, a common public street and highway for all persons to go, return, pass and repass, in, by, and with coaches, chariots, and *other carriages, at their free will and pleasure, to wit, at, &c. yet the said *C D*, well knowing the premises whilst he was so possessed of the said messuage, with the appurtenances as aforesaid, to wit, on, &c. at, &c. aforesaid, wrongfully and unjustly, put and placed divers large quantities of dirt and rubbish in the said street, near to the said messuage, and wrongfully and injuriously kept and continued the same therein, and during the night time of that day, without fixing or placing, or causing to be fixed or placed, any light, or signal, at or near such dirt and rubbish, to denote or shew that the same were so there as aforesaid, by means, and in consequence of which said negligence and improper conduct of the said *C D* in that respect afterwards, to wit, in the night time of the said — day of —, in the year aforesaid, to wit, at, &c. aforesaid, a certain chariot, or carriage, of the said *A B*, of great value, to wit, of the value of —*l.* with the said *A B* therein, then and there going, and passing in and through the said street, was accidentally driven upon and against the said dirt and rubbish, and was thereby then and there overturned, by means whereof the said *A B* then and there became and was greatly hurt, bruised, cut and wounded, and sick, sore, &c.—(*same damage*)

(1) See precedents, 8 Wentw. 28. 72. An action is not sustainable for a *public* nuisance, unless the plaintiff has sustained some particular damage, Com. Dig. tit. Action on the Case for a Nuisance, C. Co. Lit. 56. a. 9. Co. 112. b. 113. 2 T. R. 667. 3 Wils. 412.

as ante, 239. and if the plaintiff's carriage were injured, state such damage and the expense of repair—to wit, at, &c. afore-said. Consequences of nuisances.

And whereas also before, and at the time of the committing of the grievance by the said *C D* as hereinafter mentioned, there was, and from thence hitherto hath been, and still is, a certain other common and public highway, in the parish aforesaid, for all the liege subjects of our said lord the king, to go, pass and repass, at all times of the year, at their free will and pleasure; yet the said *C D*, well knowing the premises, heretofore, to wit, on the day and year aforesaid, to wit, at, &c. aforesaid, wrongfully and unjustly caused to be put and placed divers large quantities of dirt and rubbish, in the said last-mentioned common and public highway, whereby the said *A B* being a liege subject of our said lord the king, lawfully passing in and along the said last-mentioned highway in a certain carriage, was then and there with great force and violence overturned in the said last-mentioned carriage. By means, &c. [*Same damage as in the first count, and conclude as ante*, 238.] Second count, omitting the statement of the defendant's possession of the house.

* 242

Commencement in case as ante, 238.] For that whereas (n) the said *C D* heretofore, to wit, on, &c. (o) at, &c. (p) not then

(m) See the great variety of precedents indexed in 8 Wentw. Index, 15 to 21. As to this action in general, see vol. 1. Index, Mal. Pros. Co. Lit. 101. a. n. 4. 2 Wils. 305. Bac. Abr. Action on Case, H. Com. Dig. Action upon Case for a Conspiracy, A. &c. The gist of the action is the unfounded arrest, 2 Wils. 305. for no action can be supported merely for a malicious suit, 1 Salk. 14. 1 B. & P. 205. Com. Rep. 190. Whenever the imprisonment is under regular process, trespass cannot be supported, and case is the only remedy, 3 T. R. 185. Hob. 266. 1 T. R. 544. When the arrest was on process out of an inferior court, the declaration will be similar to this except in the statement of the process. Case, may be supported, though the

court had no jurisdiction, 2 Wils. 302. 376. Com. Rep. 190.

(n) It has been usual to commence the declaration by a recital that "by the law of the realm no person ought to be arrested, &c. for a debt under 10*l.* &c. see 8 Wentw. 328. Morgan's Prec. 400. 402. but as the 12 Geo. I. c. 29. (amended by 5 Geo. II. c. 27. made perpetual by 21 Geo. II. c. 3. and extended to inferior courts by 19 Geo. III. c. 70.) enacts, that when the cause of action does not amount to 10*l.* or upwards, the plaintiff shall not proceed by arrest, this public and general law needs not be recited.

(o) The teste of the writ, or the day it is actually issued; but the first is preferable; *ante*, 162. notes (h) and (i).

(p) The venue is transitory.

For a malicious arrest under a latitat, where the former suit terminated by plaintiff's taxing costs upon a rule for the payment of money into court. (m)

*For malicious
arrest.*

* 243

having any reasonable or probable(*q*) cause of action whatsoever against the said *A B*, to the amount of 10*l.* or upwards, (*r*) but wrongfully and unjustly contriving and intending to imprison, harass, oppress and injure the said *A B*, falsely and maliciously(*s*) caused and procured to be sued and prosecuted out of the court of our said lord the king, before the king himself, (the said court *then and still being holden at *Westminster*, in the county of *Middlesex*), (*t*) a certain writ of our said lord the king, called a *latitat*(*u*) at the suit of the said *C D* against the said *A B* directed to the sheriff of —, by which said writ our said lord the king commanded the said sheriff that he should take the said *A B* if he should be found in his bailiwick, and him safely keep, so that he might have his body before our said lord the king, at *Westminster*, on —, to answer the said *C D* of a plea of trespass, and also to a bill of the said *C D*, against the said *A B* for — upon promises, according to the custom of the said court of our said lord the king, before the king himself to be exhibited, and that the sheriff should then have there that writ. And the said *C D* contriving and intending as aforesaid, afterwards and before the delivery of the said writ (*or precept*) to the said sheriff to be executed as hereinafter mentioned, to wit, on, &c. aforesaid, (*x*) at, &c. (*y*) aforesaid, falsely and maliciously, and without having any reasonable or probable cause of action whatsoever against the said *A B* to the amount of 10*l.* or upwards, caused and procured the said writ (*or precept*) to be, and the same then and there was marked and indorsed for bail for

(*q*) Whether there was a probable cause, is a mixed proposition of law and fact, 1 Wils. 232. 1 T. R. 544, 545.

(*r*) *Ante*, n. (*n*).

(*s*) As to the allegation of defendant's malicious intent, see 2 Wils. 305. and 1 Wils. 233. The words "*falsely*," or "*wrongfully*," have been holden to be sufficiently expressive of a malicious intent; 1 Saund. 242. a. n. 2. 1 East, 563. Com. Dig. Action on Case for Conspiracy, C. 3. The malice is in general to be implied from the want of probable cause, 1 T. R. 545.

(*t*) This allegation is unnecessary, and if the writ be stated to have been sued out in vacation, would render the declaration demurrable, *ante*, 162. n. (*i*).

(*u*) As to the statement of a *latitat*, or bill of *Middlesex*, see *ante*, 162. of a special original, *ante*, 166. of a *capias* in C. P. *ante*, 167. If the writ were issued into *Middlesex*, observe n. (*f*), *ante*, 162. The writ should be correctly stated, 1 H. Bl. 40. 1 T. R. 238.

(*x*) The day on which the writ is stated to have been issued.

(*y*) The venue.

—2.(z) and the said writ (or *precept*) *being so marked and indorsed for bail as aforesaid, the said *C D* afterwards and before the said return thereof, to wit, on, &c.(a) at, &c.(b) aforesaid, contriving and intending as aforesaid, and without having any reasonable or probable cause of action whatsoever, against the said *A B* to the amount of 10*l.* or upwards, falsely and maliciously(c) caused the said *A B* to be arrested by his body under and by virtue of the said writ, (or *precept*), and to be thereupon imprisoned and kept and detained in prison for a long space of time, to wit, for the space of — hours then next following, and until he the said *A B*, in order to procure his release and discharge from the said imprisonment, was forced and obliged to and did then and there procure certain persons, to wit, *E F* and *G H* to become bail(d) for the appearance of him the said *A B* in the said court of our said lord the king, before the king himself, at the return of the said writ, (or *precept*), to answer to the said *C D*, according to the exigency of the said writ, (or *precept*), and upon that occasion he the said *A B* and the said *E F* and *G H* were forced and obliged to and did then and there enter into a certain bond or obligation for the purpose aforesaid, whereas in truth and in fact he the said *C D* at the time of suing forth the said writ, and of the said arrest and imprisonment, had not any reasonable or probable cause of action against the said *A B* to the amount of 10*l.* or upwards, or whereby or for which he the said *A B*, by the law of this realm, or by the practice of the said court of our said lord the king, before the king himself, could or ought to have been arrested, or

For malicious arrest.

(z) According to the fact. Sometimes it is stated that this indorsement was made by virtue of an affidavit, filed, &c. but this should be omitted, as it only incumbers the plaintiff with unnecessary evidence, 1 B. & P. 281.

(a) The precise time is not material, but it is usual to insert the day of the arrest, or some day just before it.

(b) Some place in the county in which the arrest was made, and if the venue be not laid in that county, state such venue under a *scilicet*, at the end of the sentence.

(c) *Ante*, 242. n. (s).

(d) If the plaintiff did not find bail, or if there be any doubt as to the proof of the bail-bond, this allegation and that of the costs of procuring bail, should be omitted.

For malicious arrest.

The termination of the former suit.
(e).

holden to *bail as aforesaid.† And the said *A B* further saith, that such proceedings were thereupon had in the said suit, that afterwards, to wit, on, &c.(f) a certain rule and order was duly made by the said court, according to the course and practice of the same court, whereby it was ordered by the said court, that the said *A B* should have leave to bring into court in the said suit, —l.(g) and that thereupon (unless the said *C D* should accept thereof, together with his costs and charges to be taxed by the master of the said court, in full discharge of the said suit, the said sum of —l. should be struck out of the declaration in the said suit, and paid out of the said court to the said *C D* or his attorney, and that upon the trial of the issue, the said *C D* should not be permitted to give evidence for the said sum of —l. And the said *A B* further saith, that afterwards, to wit, on, &c.(h) the said *A B* did bring into court in the said suit, the said sum of —l. in the said rule or order mentioned, and that the costs of the said *C D* in the said suit were duly taxed by the master of the said court, at the instance and request of the said *C D* at —l. which said last-mentioned sum of —l. together with *the said sum of —l. was afterwards, to wit, on, &c. last aforesaid, duly paid to the said *C D*, and the said *C D* did accept the same, together with the said sum of —l. in full discharge of the said suit. And the said action was and is by means of the premises, and according to the

* 246

(e) It must be averred that the former suit determined in the present plaintiff's favour, and a *legal* conclusion of the suit must be shewn, *Gilb. C. L. and E.* 163. 1 *Salk.* 15. 1 *Doug.* 215. *Willes*, 520. n. a. 1 *Rep.* 79. *Bac. Abr. Actions on Case*, H. *Com. Dig. Action Case Conspiracy*, C. 5. *Ante*, vol. 1. *Index*, *Mal. Pros.* 2 *T. R.* 225. 232. 1 *Saund.* 228. b. in notes, and 228, 229. but the omission is aided by verdict by the common law. 1 *Saund.* 228. b. in notes, and 228, 229. See the reason, 1 *Saund.* 224. b. 2 *T. R.* 228. In *Morgan's Prec.* 404, 405. the declaration merely alleges, "that the plaint was duly ended and determined. Several of the precedents in

the old entries referred to, 8 *Wentw. Index*, 19. do not shew the termination of the first suit. The plaintiff in the above action obtained a verdict, notwithstanding the case in 1 *Esp. Rep.* 79. 3 *Esp. Rep.* 34. and no objection was taken to this mode of determining the suit; see *Tidd's Prac. Form.* *Index*, *Judgments for Defendants*, as to the mode of describing the different modes by which the suit terminated in favour of the present plaintiff.

(f) The date of the rule; examine the draft therewith.

(g) The sum tendered must have been under 10*l.* or the declaration must be differently framed.

(h) The day of taxation.

course and practice of the said court wholly discharged, ended and determined,⁽ⁱ⁾ to wit, at, &c. aforesaid. By means^(k) of which said several premises, he the said *A B*, whilst he was so imprisoned as aforesaid, not only suffered great pain of body and mind, and was greatly exposed and injured in his credit and circumstances, and was hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be performed and transacted, but was also forced and obliged to lay out and expend, and did necessarily lay out and expend divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of —*l.* in and about the obtaining of his release from the said arrest and imprisonment, and in and about other the premises, and hath been and is by means of the premises, otherwise greatly injured and damnified, to wit, at, &c. aforesaid. [*Conclude as ante*, 238.]

For malicious arrest.

[*Same as the last precedent to the obelisk in page 245. and then proceed as follows :*] And the said *A B* in fact saith, that such proceedings were thereupon had in the said suit, that afterwards, to wit, in — term then next following, the said *C D* did not prosecute his said bill (*or writ*) against the said *A B* with effect, but voluntarily permitted his said suit to be discontinued for want of prosecution thereof, and thereupon it was then and there considered in and by the said court, that the said *C D* should take nothing by his said bill, (*or writ*), but that he and his pledges to prosecute should be in mercy, &c. as by the record and proceedings thereof still remaining in the said court of our said lord the king, before the king himself, at *Westminster* aforesaid, more fully appears;^(m) whereupon and

The like where the first suit was discontinued.
(l).

* 247

(i) *Ante*, 245. n. (e).

(k) If the plaintiff have sustained any particular damage, besides those inconveniences which are here enumerated, and which are incidental to the imprisonment, it must be stated, or the plaintiff will not be permitted

to give evidence of it on the trial, Peake, C. N. P. 46. 62.

(l) See the notes to the last precedent; see 8 Wentw. 329. and the form of a judgment of discontinuance, Tidd's Prac. Forms, 310.

(m) This is not necessary, *ante*, 182. n. (g).

*For malicious
prosecution.*

whereby the said suit then and there became and was, and is wholly ended and determined, to wit, at, &c. aforesaid. By means, &c. [*Conclude as ante, 246.*]

The like
where the
first suit was
non-proposed.
(n)

[*Same as the precedent, ante, 242. to the end of the obelisk, and then proceed as follows:*] And the said *A B* in fact saith, that the said *C D* did not prosecute his suit against the said *A B*, but therein wholly failed and made default. And thereupon afterwards, to wit, in — term, in the — year of the reign of our said lord the king, it was considered by the said court of our said lord the king, before the king himself, that the said *C D* should take nothing by his said bill, (*or writ*), but that he and his pledges to prosecute should be in mercy, and that the said *A B* should go thereof without day, &c. as by the record and proceedings thereof still remaining in the said court of our said lord the king, before the king himself, at *Westminster* aforesaid, more fully and at large appears, (o) and the said action was and is thereby wholly ended and determined, to wit, at, &c. aforesaid. By means, &c. [*Conclude as ante, 246.*]

The like
where there
was a verdict
for the de-
fendant in the
former suit.
(p).

* 248.

[*Same as the precedent, ante, 242. to the obelisk, and then proceed as follows:*] And the said *A B* in fact saith, *that such proceedings were had in the said suit, that afterwards, to wit, in — term, in the — year of the reign of our said lord the king, it was considered in and by the said court, that the said *C D* should take nothing by his said bill, (*or writ*), but that he and his pledges to prosecute should be in mercy, &c. as by the record, &c. (q) Whereupon and whereby the said suit became, and was, and is wholly ended and determined, to wit, at, &c. aforesaid. [*Conclude as ante, 246.*]

(n) See the notes to the precedent, *ante, 242*. See the form of the entry of the judgment of *nonpross*; Tidd's *Prac. Forms*, 310.

(o) Unnecessary *ante, 182. n. (g)*.

(p) See Tidd's *Prac. Forms*, 313.

(q) *Ante, 247. n. (m)*.

For that whereas the said *A B* now is a good, true, honest, just and faithful subject of this kingdom,^(s) and as such hath always behaved and conducted himself, and hath not ever been guilty, or until the time of the committing of the several grievances by the said *C D*, as hereinafter mentioned, been suspected to have been guilty of felony, or of any other such crime, by means whereof he, the said *A B* before the committing of the said several grievances by the said *C D* as hereinafter mentioned, had deservedly obtained and acquired the good opinion and credit of all his neighbours, and other good and worthy subjects of this realm, to wit, at, &c. —; ^(t) yet the said *C D* well knowing the premises, but contriving and maliciously^(u) intending to injure the said *A B* in his aforesaid good name, fame and credit, and to bring him into public scandal, infamy and disgrace, and to cause him the said *A B* to be imprisoned for a long space of time, and thereby to impoverish, oppress and wholly ruin him heretofore,† to wit, on, &c. at, &c. went and appeared before one *E F*, esquire, then and there being one of the justices of our lord the now king, assigned to keep the peace of our said lord the king in and for the county of —, and also to hear and determine divers felonies, trespasses and other misde-

For malicious prosecution.

For maliciously charging the plaintiff of felony before a justice of the peace, and causing him to be imprisoned on a warrant, until he was discharged by the justice. (r)

* 249

(r) See the various precedents in 8 Wentw. Index, 15 to 21. As to this action in general, see vol. 1. Index, tit. Mal. Pros. Bac. Abr. tit. Action on the Case, H. Com. Dig. tit. Action on the Case for a Conspiracy. 1 Saund. 228 to 230. in notes, from which it appears, that to support an action for a criminal prosecution, four circumstances must concur; 1st. Falsehood in the original charge, and which must have terminated in favour of the plaintiff. 2dly. The want of probable cause for instituting such proceeding. 3dly. Malice in the prosecutor. 4thly. Damage to the accused party, which may be either to his person by imprisonment—to his reputation by scandal—or to his property by expense, Gilb. C. L. and E. 185. 202. 12 Mod. 208. 1 T. R. 493 to 551. These four circumstances must be correctly stated in the declaration.

(s) This inducement is usually inserted, but it is not traversable, Stiles, 118. and if omitted, the declaration would be sufficient. The inducement is similar to that in an action for a libel, or for words, *post*, 255. In general, a criminal prosecution is injurious to the character of the plaintiff, see *supra*, note (r). Gilb. C. L. and E. 185. 12 Mod. 208. in which case this inducement of the plaintiff's good character is proper, but if the proceeding were not prejudicial to the plaintiff's character, the inducement should be omitted, and the declaration commence with the statement that the defendant contriving, &c. to cause the plaintiff to be imprisoned, &c. *id. ibid.*

(t) The venue is transitory.

(u) As to the allegation of malice, see *ante*, 242. n. (s), and 4 Burr. 1974.

*Per malicious
prosecution.*

* 250

meanors committed in the said county, (x) and then and there, before the said *E F*, so being such justice as aforesaid, to wit, at, &c. aforesaid, falsely and maliciously, and without any reasonable or probable cause (y) whatsoever, charged the said *A B* with having (z) feloniously stolen a certain gold watch of him the said *C D*, and upon such charge, he the said *C D* falsely and maliciously, *and without any reasonable or probable cause whatsoever, caused and procured the said *E F*, so being such justice as aforesaid, to make and grant his certain warrant, under his hand and seal, for the apprehending (a) and taking of the said *A B*, and for bringing him the said *A B* before him the said *E F*, or some other of his majesty's justices of the peace in and for the said county of —, to be dealt with according to law, for the said supposed offence; and the said *C D*, under and by virtue of the said warrant, afterwards, to wit, on, &c. to wit, at, &c. aforesaid, wrongfully and unjustly, and without any reasonable or probable cause (b) whatsoever, caused and procured the said *A B* to be arrested by his body, and to be imprisoned (c) and kept, and detained in prison for a long space of time, to wit, for the space of — hours then next following, and until he the said *C D*, afterwards, to wit, on, &c. to wit, at, &c. aforesaid, falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said *A B* to be carried and conveyed in custody before the said *E F*, so being such justice as

(x) In Com. Dig. tit. Action on Case for Conspiracy, C. 4. it is said, that it must be alleged in the declaration that the former proceeding against the plaintiff was instituted before a justice or court of competent jurisdiction to try the offence, and see Roll. Abr. Action *sur* Case, p. 50. but as it is now settled that an action may be supported for a malicious prosecution of a defective indictment, (see 4 T. R. 247. 1 Salk. 15. notes,) and that case may be supported for a malicious arrest in a court having no jurisdiction, 2 Wils. 302. it seems not material to allege that the justices, &c. had competent authority.

(y) This allegation is material, *ante*, 248. n. (r), and *ante*, 242. n. (q). 1 Wils. 232. 1 T. R. 544, 545. 4 Burr. 1974. Gilb. C. L. and E. 187. See 3 Hawk. P. C. 7 edit. 161. as to what is a probable cause.

(z) The statement of this charge is to be taken from the magistrate's warrant, or from the examination of the defendant on oath.

(a) This is to be taken from the warrant.

(b) *Ante*, 249. n. (y).

(c) The imprisonment being one of the damages, in respect of which the action is sustainable, should be stated, see *ante*, 248. n. (r).

aforesaid, and to be committed by the said justice, for a further examination, to a certain gaol or prison of our said lord the king, called —, and there, to wit, in the said gaol or prison, he the said *C D* then and there falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said *A B* to be imprisoned, and to be kept and detained in prison for a long space of time, to wit, for the space of —, then next following, and until he the said *C D*, afterwards, to wit, on, &c. falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said *A B* to be carried and conveyed in custody before one *G H*, then and there being a certain other justice of our said lord the king, assigned to *keep the peace of our said lord the king, and to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county of —, to be examined before the said justice, touching and concerning the said supposed crime, which said last-mentioned justice having heard and considered all that the said *C D* could say or allege against the said *A B*, touching and concerning the said supposed offence then and there, to wit, on, &c. last aforesaid, at, &c. aforesaid, adjudged and determined that the said *A B* was not guilty of the said supposed offence, and then and there caused the said *A B* to be discharged out of custody, fully acquitted and discharged(d) of

For malicious prosecutions.

* 251 .

(d) The declaration must shew that the former prosecution was at an end, though the omission will be aided by verdict, see the cases, *ante*, 245. n. (e), and 1 Stra. 114. Com. Dig. Action upon Case, Conspiracy, C. 5. Bac. Abr. Action on Case, H. In 2 T. R. 231. *Buller*, J. observed, that the words "released and discharged from the said imprisonment" are not sufficient, they not being equal to the word **ACQUITTED**, which has a definite meaning, namely, by a jury on the trial, and that it must be shewn upon the face of the declaration, that the original prosecution was at an end; but it must not be inferred from this observation, that no action can be supported by a person who was taken before a magis-

trate upon a charge of felony, of which the magistrate discharges him, and for which no indictment is afterwards preferred; if it were otherwise, as the party accused has no mode of forcing the prosecutor to prefer a bill, he would be without redress, and see 3 Esp. Rep. 165. Case may be supported against a person for maliciously obtaining a search warrant, though no goods were found, and though consequently no prosecution could be instituted, see *Boote v. Cooper* and another, 1 T. R. 555. 3 Esp. Rep. 144. 147. Roll. Abr. Action *sur Case*, P. and in Bac. Abr. Action on the Case, H. it is said that action lies whether the prosecutor proceed so far as actually to exhibit an indictment, or not.

For malicious prosecutions.

the said supposed offence; and the said *C D* hath not further prosecuted his said complaint, but hath deserted and abandoned the same, and the said complaint and prosecution is wholly ended and determined, to wit, at, &c. aforesaid.

Second count.

* 252

Damage applicable to both counts.

And whereas also the said *C D* further contriving and *maliciously(e) and wickedly intending as aforesaid, heretofore, to wit, on, &c. at, &c. aforesaid, falsely and maliciously, and without any reasonable or probable cause whatsoever, charged the said *A B* with having committed felony, and upon such last-mentioned charge, he the said *C D* then and there, to wit, on the same day and year last aforesaid, at, &c. falsely and maliciously caused and procured the said *A B* to be arrested by his body, and to be imprisoned and to be kept and detained in prison for a long space of time, to wit, for the space of — then next following, and at the expiration of which said time, he the said *A B* was duly discharged and fully acquitted of the said last-mentioned offence, to wit, at, &c. aforesaid.(f) By means of which said several premises(g) he the said *A B* hath been, and is greatly injured in his said credit and reputation, and brought into public scandal, infamy and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this kingdom, and divers of those neighbours and subjects, to whom his innocence in the premises was unknown, have, on occasion of the premises, suspected and believed, and still do suspect and believe, that the said *A B* hath been and is guilty of felony; and also the said *A B* hath, by means of the

(e) This count in respect of its generality, is frequently adopted as a second count, see Roll. Abr. Action *sur* Case, 2 pl. 5. It may be questionable, however, whether it would be sufficient upon demurrer.

(f) The accusation of felony before the magistrate, or in any other course of legal proceeding, cannot be treated as *libellous*, 1 Saund. 132. n. 1. but if the defendant, at any other time, accuse the plaintiff of the felony,

counts may be here added for the words, 1 Saund. 133.

(g) We have already seen that the damage may be imprisonment, scandal or expense, *ante*, 248. n. (r). These and any other particular damage should be circumstantially stated, or such as are not necessarily incidental to the premises will not be admissible in evidence, *ante*, 246. n. (k).

premises, suffered great anxiety and pain of body and mind, and hath been forced and obliged to lay out and expend divers large sums of money, in the whole amounting *to a large sum of money, to wit, the sum of — in and about the defending of himself in the premises, and the manifestation of his innocence in that behalf, and hath been greatly hindered and prevented by reason of the premises, from following and transacting his lawful and necessary affairs and business, to wit, for the space of —, and also by reason and means of the said premises, he the said *A B*, hath been, and is, otherwise greatly injured in his credit and circumstances, to wit, at, &c. aforesaid. [*Conclude as ante*, 233.]

For malicious prosecution.

* 253

[*Inducement of good character, &c. and that plaintiff had not been guilty of perjury, and of defendant's malicious intention, similar to the precedent, ante*, 248. *to the obelisk, and then proceed as follows* :]—to wit, on the — day of —, in the — year of the reign of our lord the now king, at the general session(*i*) of *oyer* and *terminer* of our said lord the king, holden in and for the county of —, at the session house for the said county, before the said *E F*, *G H*, *I K* and *L M*, esquires, and others, their fellows, justices of our said lord the king, assigned by his majesty's letters patent, under the great seal of *Great Britain*, to the same justices before named, and others, in the same letters patent named, to hear and determine divers felonies, trespasses, and other misdemeanors committed within the said county, he the said *C D* falsely and maliciously, and without any reasonable or probable cause whatsoever, indicted and caused, and procured to be indicted, the

For malicious prosecution in Middlesex of an indictment for perjury, removed into K. B. by certiorari, upon which the plaintiff was acquitted.(*h*)

(A) See the various precedents in *2 Wentw. Index*, 15 to 21, and the notes to the precedent, *ante*, 248. The proceedings in the original prosecution are to be described as in the record of acquittal, a copy of which must be produced on the trial of the action, if the former prosecution were for a felony, but not when it was for a misdemeanor. 1 Bl. Rep.

385. 1 T. R. 518. Therefore, if the court will not in the former case grant a copy of the record, no action for a malicious prosecution can be supported.

(I) This statement is in accord with the caption, or style of the particular sessions, and with the record of acquittal.

For malicious prosecutions. said *A B*, by the name of *A B*, late of the parish of —, in the county of —, for that, &c. [*Here state the material*

Removal by parts of the indictment, and then proceed as follows:]—which said indictment our said lord the king afterwards, for certain

Trial and acquittal.

reasons, caused to be brought before him, to be determined according to the law and custom of *England*; and the said *A B* further says, that the said *C D* afterwards falsely and maliciously, and without any reasonable or probable cause, prosecuted, and caused to be prosecuted, the said indictment against the said *A B*, until the said *A B*, afterwards, to wit, at the sittings at *Nisi Prius*, holden on — next after the end of the term of —, in the —(k) year of the reign of our said lord the now king, before *Lloyd Lord Kenyon*, chief justice of our said lord the king, assigned to hold pleas before the king himself, *Roger Kenyon*, gentleman, being associated unto the said chief justice, according to the form of the statute, in such case made and provided, was in due manner, and by due course of law, acquitted of the said premises in the said indictment, charged upon him by a jury of the said county of *Middlesex*; and whereupon it was afterwards, to wit, in fifteen days from the — day of *Easter*, in *Easter term*,(l) in the 40th year of the reign aforesaid, considered(m) and adjudged by the court of our said lord the king, before the king himself, the same court then and still being holden at *Westminster*, in the county of *Middlesex*, that the said *A B* should depart thence without day in that behalf, and the said *A B* was, and is duly discharged of and from the premises in the said indictment specified. As by the record and proceedings *thereof remaining in the said court of our said lord the king, before the king himself, at *Westminster* aforesaid, appears. By means whereof, &c. [*State the damage as ante, 252. and any other damage which the plaintiff has sustained, and conclude as ante, 238.*]

Judgment thereon.

* 255

(k) This day is material, and should correspond with the record of acquittal, and a variance would be fatal, 4 T. R. 590. 560. Willes, 517.

(l) This also must agree with the record, see 4 T. R. 590. 560.

(m) It is sufficient to state that the plaintiff was acquitted by a jury. Willes, 517.

—, [Commencement and conclusion as ante, 238] For *For libels.*
 that whereas^(o) the said *A B* now is a good, true, honest, just and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the said *C D* as hereinafter mentioned, was always reputed, esteemed and accepted by, and amongst all his neighbours, and other good and worthy subjects of this realm, to whom he was in any wise known, to be a person of good name, fame and credit, to wit, at, &c.^(f) And whereas also, the said *A B* hath not ever been guilty, or until the time of the committing of the said several grievances by the said *C D*, as hereinafter mentioned, been suspected to have been guilty of *perjury*,^(q) or any other such crime, by means of which said premises, he the said *A B* before the committing of the said several grievances by the said *C D* as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbours, and other good and worthy subjects of this realm, to whom he was in any wise known,^(r) to

For composing and publishing a libel, accusing the plaintiff of being forsworn on a trial, and of perjury.^(u)
General inducement of plaintiff's good character.
General inducement of innocence of the particular charge.

* 256

General consequences of plaintiff's good character.

(n) See the precedents of declarations for libels, and for words referred to in 8 Wentw. Index, page 4 to 12.

(o) It is usual to commence the declaration, either for a libel or for words, with inducements of the plaintiff's good character, and of his innocence of the crime imputed to him by the defendant, Com. Dig. Action for Defamation, G. 1. but as these inducements are not traversable, see Styles, 113. 1 Lev. 297. they may be omitted, and the declaration may commence with a statement of defendant's malicious intention to injure the plaintiff. When the libel, or slander does not affect the plaintiff in his moral character, but merely imputes to him insolvency or incapacity in the way of his trade, &c. this inducement of good character is inapplicable, and the declaration should commence with an inducement respecting the trade, &c.

(p) The venue is transitory, and the court will not change it, 1 T. R.

571. and 647. unless it be written, as well as published, only in one county, 3 T. R. 306. and 652.

(q) See ante, 255. n. (o). If the slander do not amount to a charge of any specific offence, such as perjury or theft, &c. the inducement, instead of the word in italics, should run thus: "*of the offences and misconduct hereinafter mentioned to have been charged upon and imputed to the said A B, or of any other such offences or misconduct.*"

(r) This inducement also is not traversable, but it is usually inserted. When the declaration is for a libel, or words affecting the plaintiff in his profession, trade, &c. the inducements respecting such profession, &c. usually precedes the above inducement, and which, in such case, in addition to the statement of the plaintiff's good character as above, runs, "and also by reason of the premises, he the said *A B*, in the way of his aforesaid trade and business, was daily and honestly acquiring great gains and profits therein, to wit, at, &c. aforesaid."

For libels.

The libel and innuendoes.

following,^(m) of *and concerning the said *A B*,⁽ⁿ⁾ and of and concerning the said action,^(o) and of and concerning the evidence by him the said *A B* given on the said trial, as such witness as aforesaid, (that is to say)^(p) he (*meaning*^(q) the said *A B*) was sworn on the trial, (meaning the said trial,) and thereby then and there, (meaning that he the said *A B*, in giving his evidence as such witness, on the said trial as aforesaid, had committed wilful and corrupt perjury.)

(*m*) This seems the proper mode of stating the libel, and it would be sufficient to prove that it was in *substance* correct, 2 Salk. 660, 661. It would be improper to state that the libellous matter was "to the *effect* following." 2 Salk. 417. 11 Mod. 78. 84. 95. Vin. Abr. tit. Libel, E.

(*n*) This is necessary, unless the libel be stated to have been addressed to the plaintiff, and written in the second person "*You*," &c. 1 Saund. 242. a. n. 3. Cro. Jac. 231. Com. Dig. Action on the Case for Defamation, G. 7.

(*o*) Whenever an inducement of extrinsic matter is necessary, as to which *ante*, 256. n. (*s*), it is equally necessary here to aver, that the libel related thereto, as that the libel or words were published of the plaintiff, "*in the way of his said trade*," &c. 1 Saund. 242, 243. n. 3, 4. 2 Saund. 307. n. 1. 6 T. R. 694. Com. Dig. Action on the Case for Defamation, G. 8. See the exceptions, Ld. Raym. 1480. 2 Lev. 62. and Cro. Car. 270.

(*p*) The libel may be set out either in words or in substance, 2 Salk. 660, 661. 11 Mod. 78. 84. 95. If the libel or words were in a foreign language, it must be set forth in the original, 6 T. R. 162. and though a translation is usual, it is unnecessary, and frequently not advisable, 1 Saund. 242.

n. 1. In the case of a *verbal slander*, when in a foreign language, it must be averred that the hearers understood it, unless in the case of Welch words, and the action is brought in one of the courts of Great Sessions in Wales, when it will be intended the hearers understood the words, 1 Saund. 242.

n. 1. and Com. Dig. Action Case for Defamation, G. 4. 6. but the plaintiff need not state the signification of any *English* words, though unusual or peculiar to a particular county, Com. Dig. Action Case for Defamation, G. 6. 1 Roll. Abr. 86. pl. 1. As to the statement of the words in general *id. ibid.* Any material variance will be fatal.

(*q*) As to the nature and use of an *innuendo*, see *Rex v. Horne*, Cowp. 684, 685, 686. 1 Saund. 243 n. 4. 6 T. R. 691. 4 Co. 17. b. 2 H. Bl. 123. 2 B. & P. 287. 2 Salk. 513. Com. Dig. Action Case for Defamation, G. 10. Bac. Abr. tit. Slander, S. 4. It is said that an *innuendo* is only explanatory of some matter *already* expressed; it serves to point out where there is precedent matter, but never for a new charge; it may apply what is already expressed, but cannot add or enlarge, or change the sense of the previous words. See 1 Saund. 243. n. 4. where the nature of an *innuendo* is fully explained.

*And the said *A B* further saith,^(s) that the said *C D* further contriving and intending as aforesaid, heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, falsely, wickedly, and maliciously did *publish* a certain other false, scandalous, malicious and defamatory libel, of and concerning the said *A B*, and of and concerning the said action, which had been so depending as aforesaid,^(t) and of and concerning the evidence by him the said *A B* given on the said trial as such witness as aforesaid, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the said *A B*, and of and concerning the said action, and of and concerning the evidence given by him the said *A B* on the said trial, as such witness as aforesaid, that is to say, [*vary the statement of the words and innuendoes as may be advisable under the particular circumstances of each case.*]

For libel.
Second count.
(r)

And the said *A B* further saith, that the said *C D* further contriving and intending as aforesaid, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, falsely, wickedly, maliciously, wrongfully and unjustly, did publish, *and cause and procure to be published, a certain other false, scandalous, malicious and defamatory libel, of and concerning the said *A B*, containing

Third count,
for a libel containing a direct charge of perjury or other crime.
(u)

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(r) If there be any doubt either as to the precise terms of the libel, or as to the evidence of the defendant's intention in the different parts of it, it is advisable to insert different counts varying the statement of the libel and innuendoes according to the supposed facts, and the evidence which it is expected may be adduced in support of them.

(s) If the second count commence "*And whereas also,*" &c. it will nevertheless be sufficient, 2 Lev. 193. 3 Lev. 358.

(t) Though the second count may refer to matter stated in the first, or the inducement thereto, (see 2 H. Bl. 131. 2 Wils. 114, 115. Cro. Cir. Ass. 76. Cro. Eliz. 240. 2 Lev. 193.) yet it is necessary when the libel is not actionable in itself, as stated in the second or subsequent count, that the

inducement, *ante*, 256. n. (s), should extend to such counts, and that it be averred that the libel was published, or the words uttered, with reference to the matter stated in such inducement.

(u) If there be any direct charge of perjury, or of any other offence obviously actionable, without any inducement or explanation, one or more counts should be inserted in the declaration as above, in order to avoid the necessity of proving the matter stated in the inducement, and in such case it should be merely stated that the libel was published, or the *colloquium* was had of and concerning the plaintiff generally, without any allegation that the same related to the action, or to the examination of the plaintiff as a witness, as in the preceding counts.

For libels.

General da-
mage.(x)

(amongst other things) certain other false, scandalous, malicious, defamatory and libellous matters, of and concerning the said *A B*, as follows, that is to say, he (meaning the said *A B*) is perjured. By means of the committing of which said several grievances by the said *C D* as aforesaid, he the said *A B* hath been and is greatly injured in his said good name, fame and credit, and brought into public scandal, infamy and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this realm, insomuch that divers of those neighbours and subjects to whom the innocence and integrity of the said *A B* in the premises were unknown, have, on occasion of the committing of the said grievances by the said *C D* as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the said *A B* to have been, and to be a person guilty of *perjury*, and have, by reason of the committing of the said grievances by the said *C D* as aforesaid, from thence hitherto wholly refused, and still do refuse to have any transaction, acquaintance or discourse with him the said *A B*, as they were before used and accustomed to have, and otherwise would have had. And *also by reason thereof, one *E R*, who before, and at the time of the committing of the said grievances, was about to retain and employ, and would otherwise

* 262
Special da-
mage.(y)

(x) This statement of general damage is not traversable.

(y) As to the statement of special damage, see vol. 1. Index, tit. Damages. Com. Dig. Action on Case for Defamation, G. 11. When the libel, or verbal slander, be not in itself actionable, and the action is sustainable merely in respect of special damage, the declaration would be defective, if such damage were not correctly stated; 1 Saund. 243. n. 5. but if the libel or words be of themselves actionable, the plaintiff may recover, though no special damage be stated or proved; *id. ibid.* In either case, however, the plaintiff cannot give evidence of any special damage, unless it be stated in the declaration; Bull. N. P. 7. 1 Stra. 666. 1 Saund. 243. n. 5. The special damage must be the legal and natural consequence

of the words spoken, 8 East, 3. and it should seem that if the plaintiff might have his action over against the third person in respect of his refusal to complete a contract, &c. which he had entered into with the plaintiff, the damage is not sufficient; therefore care must be taken in the statement of the damage; 2 B. & P. 269. 3 B. & P. 272. The special damage must be particularly specified in the declaration; therefore in a declaration by a victualler for calling his wife whore, whereby several customers left off dealing with him, without naming any one in particular; this was held not to be a sufficient statement of special damage, Bull. N. P. 7. 1 Saund. 243. c. n. 5. 8 T. R. 130. 1 Roll. Abr. 58. 2 B. & P. 288, 289. Sir W. Jones, 196.

have retained and employed the said *A B*, as his servant, for certain wages and reward to be therefore paid to him the said *A B*, afterwards, to wit, on the day and year aforesaid, at, &c. aforesaid, wholly refused to retain and employ the said *A B* in the service and employ of him the said *E F*, and the said *A B* hath from thence hitherto remained and continued, and still is wholly out of employ; and the said *A B* hath been, and is, by means of the premises, otherwise greatly injured, to wit, at, &c. aforesaid. To the damage, &c. [*Conclusion as ante*, 238.]

[*The declaration in an action for VERBAL SLANDER, may be framed precisely as the last precedent, as far as the obelisk, page 257. and to which precedent and the notes, the reader is referred. The greater part of the rules stated in those notes, namely, with respect to the general inducement of the plaintiff's good character—his innocence of the particular charge—the general consequences of such good character—the necessity for the statement of a special inducement of extrinsic matter, and of the defendant's malicious intention, are for the most part applicable to declarations for VERBAL slander, and will explain the points to be attended to in the formation of such declaration. From the obelisk proceed as follows:*—in a certain discourse which he the said *C D* then and there had with the said *A B*, of and concerning him the said *A B*, (a) in the presence and hearing (b) of divers good and worthy subjects of our lord the now king, then and there (c) in the presence and hearing (d) of the said

For verbal slander.
For a verbal charge of perjury. First count for words spoken to the plaintiff. (z)

* 263

(z) See the precedents of declarations for libels, and for words referred to, 8 Wentw. Index, page 4 to 12.

(a) The statement in this place of the *colloquium*, "of and concerning the plaintiff," will not in general dispense with the necessity for the subsequent statement, that the slanderous words were of and concerning the plaintiff, 1 Saund. 242. a. n. 3. 2 Saund. 307. n. 1.

(b) As to the statement of a pub-

lication of a libel, &c. *ante*, 258. and *infra*, n. (d).

(c) Neither the time nor the place are material.

(d) As to the statement of the publication, *ante*, 258. and 1 Saund. 242. n. 1. Com. Dig. Action Defamation G. 4. The statement that these words were spoken in the "*presence*" of divers persons, is sufficient without stating the "*hearing*" also, Cro. Eliz. 486. Noy, 57. Cro. Jac. 39. Gro. Car. 199.

For verbal
slander.

last-mentioned subjects, falsely and maliciously^(c) spoke and published to^(f) and of and concerning the said *A B*,^(g) [and if the words be actionable only with reference to the inducement of some extrinsic matter, say, "of and concerning" such matter; see *ante*, 258. and 2 Saund. 307. a. n. 1.] these^(h) false,⁽ⁱ⁾ scandalous, *malicious and defamatory words, following, that is to say, you^(k) (meaning^(l) the said *A B*) are perjured.

* 264

Second count
for words of
the plaintiff.
(m)

And afterwards,⁽ⁿ⁾ to wit, on, &c. aforesaid, at, &c. aforesaid, in a certain other discourse which the said *C D* then and

(c) As to the statement of the defendant's malicious intention, *ante*, 257. n. (u). The declaration may be either that the defendant "*falsely spoke*" the words, or that he spoke "*the false words*," 1 Keb. 273.

(f) See *post*, 264. n. (k).

(g) These words are very material, 1 Saund. 242. a. *Ante*, 258, 259. and when the words are actionable only in respect of the slander affecting the plaintiff in the way of his trade, &c. or with reference to some prior inducement in the declaration, it must be alleged that they were spoken "of and concerning" such trade, &c. 2 Saund. 307. a. n. 1. Com. Dig. Action on Case for Defamation, G. 3.

(h) Verbal slander should be stated in this manner, and it would be improper to state that the words were "*in substance and to the effect following*;" 11 Mod. 78. 84. 95. 2 Salk. 660. Com. Dig. Action Defamation, G. 6. Vin. Abr. tit. Libel, E. These words, "*vel consimilia*," would be too uncertain, Cro. Eliz. 645.

(i) This allegation is a sufficient averment of malice, *ante*, 257. n. (u). 1 Saund. 242. a. n. 2. 1 East, 563.

(k) Proof of words spoken in the third person will not support a declaration for words spoken in the second, and *vice versa*; 4 T. R. 217. Bull. N. P. 5. See *vide*, Rep. temp. Hardw. 306. Nor will words spoken by way of interrogation, support a charge of

words spoken affirmatively, 8 T. R. 150. The plaintiff needs not prove all the words laid, 2 East, 438. acc. Willea, 444. *semb. cont.* And the addition or omission of a word, will not, in the case of verbal slander, be material, unless it alter the sense, Bull. N. P. 6. and it is sufficient for the plaintiff to prove the words to have been spoken in substance as stated, Bac. Abr. tit. Slander, S. 1. Rep. temp. Hardw. 305. and Com. Dig. Action Defamation, G. 6. Though some of the words spoken may not be actionable, yet if they be spoken at the same time as those which are actionable, they may all be stated in one count, 10 Co. 131. a. 2 Saund. 307. a. n. 1. 3 Wils. 185. But if words which are not actionable, be stated by themselves in a distinct count, and entire damages be given, judgment will be arrested, *id. ibid.* Words not stated in the declaration, may, if not actionable in themselves, be given in evidence, in aggravation of damages, Peake's C. N. P. 125. 22. 166. Bull. N. P. 7.

(l) As to the nature and use of the innuendo, *ante*, 259. n. (g), and 1 Saund. 243. n. 4.

(m) See the notes to the preceding count, which are in general applicable, and n. (k).

(n) The words, "*And whereas also*," would not be demurrable, *ante*, 260. n. (s).

there had, in the presence and hearing of one *E F*, (o) and of divers other good and worthy subjects of this realm, he the said *C D*, further contriving and intending as aforesaid, then and there in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published(h) of and concerning the said *A B*, [and if the words be actionable only with reference to the inducement of some extrinsic matter, say, "of and "concerning" such matter, ante, 258. 263. 2 Saund. 307. a. n. 1.]—these other false, scandalous, malicious and defamatory words following, that is to say, he(g) (meaning the said *A B*) is perjured. By means, &c.—[here state the damage, as ante, 261. observing the notes thereto, and conclude as ante, 238.]

For criminal conversation.

* 265

[Commencement as ante, page 1, omitting the words, "of a plea of trespass on the case," &c.]—For that the said *C D*, on, &c. and on divers other days and times between that day

For criminal conversation, *vi et armis*.

(r)

(o) It is said that if the words are laid to be spoken before *E F* and others, it is sufficient to prove that they were spoken in the presence of others only, Bull. N. P. 6.

(p) The omission of the statement of the publication of the words in a second, or subsequent count, may be aided by the statement of it in the first, 2 Lev. 193. 2 Wils. 114. Ante, 260. n. (t).

(q) Ante, 264. n. (k).

(r) See the points relating to this action in Selwyn's N. P. 9 to 19. Bull. N. P. 26. Bac. Abr. tit. Marriage, E. 2. 3 Bl. Com. 139. I have not met with any precedent in which the declaration for crim. con. was framed in case; the injury has always been described, as committed with force, the law supposing force and constraint, the wife having no power to consent, 3 Bl. Com. 139. 7 Mod. 79. Bac. Abr. tit. Marriage, E. 2. The action, however, is in effect in case, 6 East, 387, 251. because, first, the wrong complained of is not immediate, but consequential, the gist of the action not being the supposed

assault on the wife, but the consequent corruption of the body and mind of the wife, 6 East, 389. 2dly. That the plaintiff may declare with a *quod cum*, which is improper in trespass, 2 Salk. 636. 1 Stra. 621. 3dly. That the injury may be stated to have been committed "on divers days and times," &c. which is improper in trespass for an assault, 6 East, 391. 395. 4thly. That the plea of the statute of limitations is not guilty within six years, 2 Burr. 753. 6 East, 387. and not as in trespass for an assault within four years, 2 Salk. 420. And lastly, that the plaintiff is entitled to full costs, though he should not recover 40s. damages, 3 Wils. 519. 1 Salk. 206. 2 Ld. Raym. 831. When it may be doubtful whether the criminal conversation can be proved, and the defendant have been guilty of enticing away, or harbouring the wife, it is advisable to add counts for such injuries, and which may be framed as in the precedent in Willes, 578, 579, 580. and it may be advisable in that case to frame the count as in the next precedent.

*For criminal
conversation.*

* 266

and the day of exhibiting this bill, with force and arms, &c. assaulted and ill-treated *E F*, then and still being the wife of the said *A B*, to wit, at, &c. and then and there debauched, and carnally knew her, whereby he, the said *A B*, for a long space of time, to wit, from the day and year first above-mentioned, hitherto, *hath wholly lost and been deprived of the comfort, fellowship, aid and assistance of his said wife, in his domestic affairs, which he the said *A B* during all that time, ought to have had and otherwise might and would have had, to wit, at, &c. aforesaid. And other wrongs to the said *A B* then and there did, against the peace of our said lord the king, and to the damage of the said *A B* of —. and therefore he brings his suit, &c.

*The like in
form in case.*

[Commencement as ante, page 238.]—For that whereas the said *C D*, contriving, and wrongfully, wickedly and unjustly intending to injure the said *A B*, and to deprive him of the comfort, fellowship, society, aid and assistance of *E F*, the wife of him, the said *A B*, and to alienate and destroy her affection for him, the said *A B*, heretofore, to wit, on, &c. and on divers other days and times, between that day and the day of exhibiting this bill at, &c. —, wrongfully,^(s) wickedly and unjustly debauched and carnally knew the said *E F*, then and there and still being the wife^(t) of him the said *A B*, and thereby the affection of the said *E F*, for him the said *A B*, was then and there alienated and destroyed, and also, by means of the premises, he the said *A B* hath thence, hitherto, wholly lost and been deprived of the comfort, fellowship, society, aid and assistance of the said *E F*, his said wife, in his domestic affairs, which he, the said *A B*, during all that time ought

(s) In an action for debauching a wife or servant, it is not necessary to allege, or prove, that the defendant *knew* that the female was the wife or servant of the plaintiff, though in an action for seducing or harbouring a wife, or servant, such allegation and evidence are necessary, Peake's C. N. P. 55. Peake's Law of Evidence, 334. Willes, 577.

(t) In an action for crim. con. the plaintiff must prove an actual marriage, 4 Burr. 2037. Peake's Law of Evidence, 330. Selwyn's N. P. 14. 16. but in an action of trespass by husband and wife, for the battery of the wife, it is sufficient to prove reputation of marriage, Stra. 480.

to have had, *and otherwise might and would have had, to wit, *For debauching daughter and servant.* at, &c. aforesaid.

[*Commencement as ante, page 238.*—For that whereas the said *C D*, contriving, and wrongfully and unjustly intending to injure the said *A B*, and to deprive him of the service and assistance of *E F*, the daughter and servant of him the said *A B*, heretofore, to wit, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, at, &c. debauched and carnally knew the said *E F*, then and there, and from thence, for a long space of time, to wit, hitherto, being the daughter and servant^(x) of the said *A B*, whereby the said *E F* became pregnant and sick with child, and so remained and continued for a long space of time, to wit, for the space of nine months then next following, at the expiration whereof, to wit, on, &c. at, &c. aforesaid, she the said *E F* was delivered of the child with which she was so pregnant as aforesaid, to wit, at, &c. aforesaid, by means of which said several premises, she the said *E F*, for a long space of time, to wit, from the day and year *first above-mentioned, hitherto, became and was unable to do or perform the necessary affairs and business of the said *A B*, so being her father and master aforesaid, and thereby he the said *A B*, during all that time, lost and was deprived of the service of his said daughter and servant, to wit, at, &c. aforesaid. And also, by means of the

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(u) As to actions by a parent or master, in that character, see *Bas. Abr. tit. Master and Servant, O. Peake's Law of Evidence, 333.* For the battery of a servant it is clear, that trespass *vi et armis* is proper, though the injury to the master is not immediate, but consequential, *ante, 265. n. (r).* 6 East, 390. A parent, in that character merely, cannot support an action for debauching or beating his daughter, which is only sustainable in respect of the supposed loss of service, some slight evidence of which must, in general, be adduced, 5 East, 45. 5 T. R. 360. 2 T.

R. 168. *Peake's C. N. P. 55. 233.*—Sir T. Raym. 259. 9 Co. 113. a. The declaration may be *vi et armis*, 3 Wils. 18. but *case* seems more proper, when the action is merely for the seduction and loss of service; 2 T. R. 167. 6 East, 387. but where the offence is accompanied with an illegal entry of the father's house, he may declare in trespass for the entry, and allege the seduction and loss of service as consequential, 2 T. R. 167.

(x) It is not necessary to allege or prove that the defendant knew that the female was the daughter or servant of the plaintiff, *ante, 266. n. (s).*

Enticing a
way appren-
tices.

said several premises, he, the said *A B*, was forced and obliged to and did necessarily pay, lay out and expend divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of —*l.* in and about the nursing and taking care of the said *E F*, his said daughter and servant, and in and about the delivery of the said child, to wit, at, &c. aforesaid. To the damage, &c.—[*Conclusion as ante*, 238.]

[*If the female were not the daughter of the plaintiff, omit the words "daughter" and "father" throughout; or in case where the legitimacy may be questionable, a count omitting those words, which are not necessary, see ante*, 267. n. (u). *Peake*, C. N. P. 55. should be added.]

By a master
for enticing a
way his serv-
ant or ap-
prentice.(y)
* 269

[*Commencement as ante*, 238.]—For that whereas before and at the time of the committing of the several grievances by the said *C D*, as hereinafter mentioned, one **E F* was and from thence hitherto hath been, and still is, the servant (or "*apprentice*") of the said *A B*, in his trade or business of a —, which he the said *A B*, then exercised and carried on, and still doth exercise and carry on, to wit, at, &c. Yet the said *C D*, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure, prejudice and aggrieve the said *A B* in his aforesaid trade and business, and to deprive him of the service of the said *E F* as such servant (or "*apprentice*," as aforesaid, and of the profits, benefits, and advantages, which might and would otherwise have arisen and accrued to him from such service whilst the said *E F* was such servant (or

(y) As to this action in general, see *Bac. Abr. tit. Master and Servant*, O. 3 Bl. 142. *Cowp.* 54. 2 H. Bl. 311. 2 Esp. Rep. 734. Case is the usual and proper form of action, for the reasons, *ante*, 265. n. (r). *Salk.* 380. *Ld. Raym.* 1116. *Cowp.* 54. 2 *Saund.* 169. The defendant cannot avail himself of any objection to the indenture of apprenticeship, or contract of hiring, 2 H. Bl. 311. 7 T. R. 310, 311. 314. 1 *Anstr.* 256. Sometimes, by way of inducement, the indentures of apprenticeship, or contract of hiring, are stated at

length; but this appears unnecessary and injudicious, see the precedents, 2 *Saund.* 169. 8 *Wentw. Index*, 31. It is necessary to allege and prove, that the defendant knew that the third person was the apprentice, or servant of the plaintiff, *Peake's C. N. P.* 55. *Peake's Law of Evidence*, 354. 3 Bl. Com. 142. *Willes*, 582. but it is not necessary to state what means of enticement the defendant adopted, *Willes*, 577. The damage *per quod servitium amisit* must be alleged and proved. 5 *East*, 59. *Burr.* 1352. 3 Bl. Com. 142.

"*apprentice*,") of the said *A B* as aforesaid, to wit, on, &c. at, &c. aforesaid, unlawfully, wrongfully, and unjustly enticed, persuaded and *procured* the said *E F*, so then being the servant (or "*apprentice*") of the said *A B* as aforesaid, to depart from and out of the service of him the said *A B*, by means of which said enticement, persuasion and procurement, and on no other account whatsoever, the said *E F* so being such servant (or "*apprentice*") as aforesaid, then and there, to wit, on, &c. aforesaid, at, &c. aforesaid, unlawfully, wrongfully, and unjustly, and without the license or consent, and against the will of the said *A B*, departed from and out of the service of him the said *A B*, and hath remained and continued absent from such service for a long space of time, to wit, from thence hitherto, whereby the said *A B* hath, for and during all that time lost, and been deprived of the service of the said *E F* in his aforesaid trade and business, and of all the profits, benefits, and advantages which might, and would otherwise, have arisen and accrued to him from such service, and hath been, and is, otherwise greatly injured in his aforesaid trade and business of a —, to wit, at, &c. aforesaid. And whereas also, the said *E F* heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, then and still being the servant (or "*apprentice*") of the said *A B*, unlawfully, wrongfully and unjustly, without the license or consent, and against the will of the said *A B* departed, and went away from and out of the service of the said *A B*, to wit, at, &c. aforesaid, and afterwards, to wit, on, &c. aforesaid, there went and came to the said *C D*. Yet the said *C D* well knowing the said *E F* to be the servant (or "*apprentice*") of the said *A B*, but contriving, and wrongfully, and unjustly intending to injure the said *A B*, and to deprive him of the service of the said *E F* his said servant (or "*apprentice*,") and of all the profits, benefits, and advantages which might, and would otherwise have arisen and accrued to him from such service, then and there, to wit, on, &c. aforesaid, at, &c. aforesaid, unlawfully, wrongfully and unjustly received the said *E F*, so then being the servant (or "*apprentice*") of the said *A B* as aforesaid, into the service of him the said *C D*, and harboured, detained and kept the said *E F* in his said service for a long space of time, to wit, from the day and year last aforesaid, hitherto, whereby the said *A B*,

Enticing a-
way appren-
tices.

Second count
for harbour-
ing.

* 270

Enticing away apprentices.

for and during all that time, lost, and was deprived of the service of the said *E F*, and of all the profits, benefits, and advantages which might and would otherwise have arisen and accrued to him from such service, to wit, at, &c. aforesaid.—
[*Conclude as ante*, 238.]

II. FOR TORTS TO PERSONAL PROPERTY.

Declarations of this nature are principally against attorneys, or other agents, or bailees—for deceit on the sale of goods, &c.—for negligence in driving carriages or navigating ships—for excessive or irregular distresses—for rescue of goods distrained for rent or *damage-feasant*, or of prisoners—against sheriffs and other officers for escapes, false returns, &c.—for unduly exercising trades or imitating inventions—in trover—or for injuries to personal property in reversion.

It is most usual to declare in *assumpsit*, against *attorneys and agents*, see the form, *ante*, 96. see the printed forms in case, 8 *Wentw. Index*, 29. 39. 47. 2 *Wils.* 325. 4 *Burr.* 2061. *3 *Wils.* 443. 2 *Bl. Rep.* 906. 1 *T. R.* 656. 1 *T. R.* 101. but against *bailees* of different descriptions, if there be any doubt as to the number of the parties, or if there be any evidence of a conversion of the personal property, or if a plea of bankruptcy be expected, (6 *T. R.* 695.) it is advisable to declare in case as in the following precedents, in order to avoid a plea in abatement, if too few persons be made defendants; or a nonsuit, if too many persons be made defendants; and also in order to join a count in trover, see *Govett v. Radnidge* and others, 3 *East*, 62. 70. *Ante*, 117. n. (d). The precedents in *assumpsit* against bailees of different descriptions, *ante*, 103 to 126. may easily be varied into case, observing the form of the following precedents:—See a precedent in case for the loss of a dog, and in trover, 1 *T. R.* 274. for negligence in shipping a hogshead, 3 *East*, 62. and for not accounting for the produce of a bill of exchange, 6 *East*, 233. 1 *New Rep.* 43.

[Commencement as ante, 238.] For that whereas the said *C D*, before and at the time of the delivery of the goods and chattels to him, as hereinafter next mentioned, was, and thence hitherto hath been, and still is, a common carrier of goods and chattels for hire, from — to —, to wit, at, &c. And whereas also, the said *A B*, whilst the said *C D* was such common carrier as aforesaid, to wit, on, &c. at, &c. (*the real place*) to wit, at, &c. (*the venue which is transitory*), caused to be delivered to him the said *C D*, and the said *C D* then and there accepted, and received of and from the said *A B* a certain box, containing divers goods and *chattels, to wit, &c. (*specify the articles*)(a) of the said *A B* of great value, to wit, of the value of —*l.* to be safely and securely carried and conveyed by him the said *C D* from — aforesaid to — aforesaid, and there, to wit, at, &c. aforesaid, safely and securely to be delivered for the said *A B* for certain reasonable reward to him the said *C D* in that behalf. Yet the said *C D*, not regarding his duty as such common carrier as aforesaid, but contriving and fraudulently intending, craftily and subtly to deceive, defraud and injure the said *A B* in this behalf, did not, nor would, safely or securely carry or convey the said box and its contents aforesaid, from — aforesaid to — aforesaid, nor there, to wit, at — aforesaid, safely or securely deliver the same for him the said *A B*, but on the contrary thereof he the said *C D*, so being such common carrier as aforesaid, so carelessly and negligently behaved and conducted himself, in the premises, that by and through the carelessness, negligence and default of the said *C D* in the premises, the said box and its contents aforesaid, being of the value aforesaid, became and

Against carriers by land.
Against a carrier for losing a box. (z)

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(z) See the precedent in assumption, and the notes ante, 117. Bac. Abr. tit. Carriers. 8 Wentw. Index, 43. 47, 48. And when it is advisable to declare in case, instead of assumption, *supra*, and ante, 117. n. (d). 3 East, 62. 70. Formerly it was usual to declare setting out the custom of the realm, 1 Sid. 245. Com. Dig. Action Case Negligence, C. 2. But this custom being the common law, need not be stated, Hob. 18. 1 Wils. 281. Bac. Abr. Carriers, A. and see the precedent, 3 Wils. 429.

(a) It is said that the goods must be set out with the same certainty as in trover. 2 Ventr. 78. Com. Dig. Action Case Negligence, C. 2.

Against carriers by land.
Second count,
for not carrying within a
reasonable
time, and losing the box.
(b)

were wholly lost to the said *A B*, to wit, at, &c. aforesaid. And whereas also, heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, to wit, at, &c. aforesaid, the said *A B* caused to be delivered to the said *C D* a certain other box, containing certain other goods and chattels, to wit, &c. of him the said *A B*, of great value, to wit, of the value of ——. to be taken care of and safely and securely carried and conveyed by him, the said *C D* from ——— aforesaid to ——— aforesaid, and there, to wit, at ——— aforesaid, to be safely and securely delivered by the said *C D* *for the said *A B* within a reasonable time then next following, for certain hire and reward to the said *C D* in that behalf; and although the said *C D* then and there accepted, and had and received the said last-mentioned box and its contents aforesaid, for the purpose aforesaid, and undertook the carriage, conveyance and delivery thereof as aforesaid, within such reasonable time as aforesaid; and although a reasonable time for the carriage, conveyance and delivery thereof as aforesaid, hath long since elapsed, yet the said *A B* not regarding his duty in that behalf, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said *A B* in this respect, did not, nor would, within such reasonable time as aforesaid, or at any time afterwards, (although often requested so to do,) take care of, or safely, or securely, carry and convey the said last-mentioned box and its contents aforesaid, from ——— aforesaid to ——— aforesaid, nor there, to wit, at ——— aforesaid, safely or securely deliver the same for the said *A B*, but hath hitherto wholly neglected and refused so to do; and by means of the negligence and improper conduct of the said *C D* in that behalf, the said last-mentioned box and its contents aforesaid, have not yet been delivered to or for him the said *C D*, at ——— aforesaid, or elsewhere, and are wholly lost to the said *A B*, to wit, at, &c. aforesaid.

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[Add a count in trover, if there be any evidence of a conversion, 3 East, 70. Trover lies against a carrier, though he

(b) See the counts in 3 Wils. 429. case for a mere nonfeasance might not be sustainable, 6 East, 333. 3 Wils. As the above count states the loss of the goods it is sustainable, though 248. 5 T. R. 143. 1 New Rep. 43.

by mistake, deliver goods to a wrong person, Peake, C. N. P. 42. Jones on Bailments, 96 to 99. but it cannot be supported against a carrier or wharfinger, where the goods have been stolen or lost, 5 Burr. 2825. 1 Vent. 223. [Conclude as ante, 238.] *Against Innkeepers.*

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[Commencement as ante, 238.] For that whereas by *the law and custom of this realm, innkeepers, who keep common inns for the reception, lodging and entertainment of travellers putting up at and abiding in the same, are bound to keep the goods and chattels, brought by such travellers into, and being within their respective inns, safely, and without any diminution or loss. And whereas the said *C D* before, and at the time of the loss hereinafter next mentioned, was, and from thence hitherto hath been, and still is, an innkeeper, and as such innkeeper, he the said *C D* hath for and during all that time kept, and still doth keep, a certain common inn, for the reception, lodging and entertainment of travellers, that is to say, a certain inn, commonly called or known by the name and sign of —, situate and being at —, to wit, at, &c. And whereas also, the said *C D*, so being such innkeeper, and so keeping the said inn as aforesaid, the said *A B*, (or if his servant, "one *E F*, the servant of the said *A B*,") heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, put up and was then and there received into the said inn as a traveller by the said *C D*, and then and there brought into the said inn a certain box, containing certain wearing apparel, goods and chattels, to wit, &c. (enumerate the chattels) of him the said *A B*, of great value, to wit, of the value of —*l.* and which said box and its contents aforesaid, were then, and from thence, until, and at the time of the loss hereinafter mentioned, within the said inn, and

Against an innkeeper for the loss of a box.(c)

(c) As to the liability, &c. of an innkeeper, see Bac. Abr. tit. Inns. Com. Dig. Action, Case Negligence, B. 1. &c. and tit. Pleader, 2 Q. 5 T. R. 273. For the printed declarations against innkeepers, Rast. Ent. 404. Co. Ent. 347. Thomp. 42. 8 Wentw. Index, 44. 47, 48. and the ancient mode of declaring, Bac. Abr. tit. Inns, C. 6. In conformity to the usual practice I have, in the above precedent, recited the custom of the realm, but this being the common law seems to be unnecessary. *Ante* 271. n. (e), and 1 Wils. 234

Against Inn-keepers.

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that the said *A B*, (or "*the said E F, the servant of the said A B,*") during all that time abided as a traveller therein, to wit, at, &c. aforesaid; yet the said *C D* so being such innkeeper as aforesaid, not regarding his duty as such innkeeper, did not keep the said *box and its contents aforesaid, so brought into and so being in the said inn as aforesaid, safely, and without diminution or loss, but on the contrary thereof, the said *C D* and his servants so negligently and carelessly behaved and conducted themselves in that behalf, that afterwards, and whilst the said *A B* (or "*the said E F the servant of the said A B*") so abided in the said inn as aforesaid, to wit, on the same day and year aforesaid, the said box and its contents aforesaid were, by and through the mere carelessness, negligence and default of the said *C D* and his servants in that behalf, wrongfully and unjustly taken and carried away by some person or persons, to the said *A B* (or to the said *A B* and *E F* his said servant) unknown, and were and still are thereby wholly lost to the said *A B*, to wit, at, &c. aforesaid. [*Add a count in trover, if there be a probability of supporting it in evidence, ante, 273. 5 Burr. 2825. 1 Vent. 223. and conclude as ante, 238.*]

Against a baillee for negligence. (d)

[*Commencement as ante, 238.*] For that whereas heretofore, to wit, on, &c. at, &c. the said *A B*, at the special instance and request of the said *C D*, caused to be delivered to him the said *C D*, certain goods and chattels, to wit, &c. of him the said *A B*, of great value, to wit, of the value of —*l.* to be by the said *C D* safely and securely loaded on board a certain ship or vessel, at, &c. for the said *A B*, for reasonable reward(e) to the said *C D* on that behalf, the said *C D* then and there had and received the said goods and chattels, for the purpose aforesaid; yet the said *C D* not regarding his duty in that behalf, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, by himself

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(d) See the use of declaring in case instead of assumpsit, *ante*, 270, 271. as to the different description of bailees, *ante*, 103. and the several precedents, 103 to 125. which may easily be applied to the declaration in case. See other printed precedents, *ante*, 270, 271. 8 Wentw. Index, 22.

(e) If no reward were to be paid, this should be omitted, *Coggs v. Bernard*, 2 Ld. Raym. 909. 1 Hen. Bl. 158. 5 T. R. 143. *Ante*, 103. as to *mandatum* being the second description of bailment.

and his servants in that behalf, conducted himself so carelessly, negligently and improperly, in and about the loading of the said goods and chattels, on board the said ship or vessel, that by and through the mere negligence and improper conduct of the said *C D* and his servants in that behalf, the said goods and chattels became and were greatly broken, damaged and destroyed, and wholly lost to the said *A B*, to wit, at, &c. aforesaid. [It is advisable in general against a bailee to add a count stating that the defendant "had the loading of the hogshead," &c. or the performance of the matter which it was his duty to perform, which count may be framed as in *Govett v. Radnidge*, 3 East, 62. and if there be any evidence of a conversion, a count in trover should be added, and conclude as ante, 238.]

[Commencement as ante, 238.] For that whereas the said *A B*, heretofore, to wit, on, &c. at, &c. at the special instance and request of the said *C D*, bargained with the said *C D*, to buy of him the said *C D*, a certain horse, at and for a certain price, or sum of money, to wit, the sum of —/. and the said *C D* by then and there falsely and fraudulently warranting the said horse to be sound and quiet in harness, then and there sold(*g*) the said horse to the said *A B*, for the said sum of —/. of lawful, * &c. then and there paid by the said *A B* to the said *C D* for the same; whereas in truth and in fact, the said horse was, at the time of the said warranty and sale thereof, unsteady, restive, and ungovernable in harness, and hath, from thence hitherto, so remained and continued; and the said *A B* in fact saith, that the said *C D* by means of the premises on the day and year aforesaid, at, &c. aforesaid, falsely and fraudulently deceived him the said *A B*, on the sale of the said horse as aforesaid, and thereby the said horse afterwards, to wit, on, &c.

For a false warranty of a horse. (f)

* 277

(f) As to warranties in general, *ante*, 100. n. (t). See the use of declaring in case, *ante*, 271. 3 East, 62. and the precedents in 3 Wils. 40 to 43. 2 East, 446. 8 Wentw. Index, 28, 29, 30. of declarations for deceit on the sale of goods, &c. and *ante*, 100 to 102. notes (t), (u), (x). In this action upon an express warrant

ty, the *scienter* need not be alleged, nor if stated, need it be proved, 2 East, 446.

(g) It is proper to say *warrantando vendidit*, in order that it may appear that the warranty was at the time of the sale, Com. Dig. Action. Case for Deceit, F. 2.

*Deceitful
warranties.*

aforesaid, not only became of no use or value to the said *A B*, but also then and there greatly kicked, hurt, injured and spoiled a certain other horse of him the said *A B*, of great value, to wit, of the value of —*l.* and thereby also the said *A B* was then and there put to great expense of his monies, in the whole amounting to a large sum of money, to wit, the sum of —*l.* in and about the feeding and taking care of and selling and disposing of the said horse, to wit, at, &c. aforesaid.

Second count. And whereas also the said *A B* afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, bargained with the said *C D*, to buy of him the said *C D*, a certain other horse, and the said *C D* by then and there falsely warranting the said last-mentioned horse to be sound, falsely and fraudulently induced the said *A B* then and there to buy of him the said *C D*, the said last-mentioned horse for a certain other large sum of money, to wit, the sum of —*l.* of like lawful money, whereas in truth and in fact, the said last-mentioned horse, at the time of the said last-mentioned warranty and sale was not sound, but then was, and thence hitherto hath been, and still is, unsound, and of no use or value to the said *A B*, to wit, at, &c. aforesaid. And so the said *A B* saith, that the said *C D* falsely and fraudulently deceived him the said *A B*, on the sale of the said last-mentioned horse as aforesaid, to wit, at, &c. aforesaid. [*Conclude as ante*, 238.]

* 278

For falsely
representing
a third person
fit to be trust-
ed. (h)

*[*Commencement as ante*, 238.] For that whereas the said *A B*, before and at the time of the committing of the grievance by the said *C D*, as hereinafter next mentioned, was and from thence hitherto hath been and still is a —, and the trade and business of a —, hath for and during all that time, exercised and carried on, and still doth use, exercise and carry on, to wit, at, &c. And whereas also the said *A B* saith

(h) In order to support an action of this nature, the representation must be made *male animo*, 3 East, 107. 3 B. & P. 367. See the precedents in *Pasley v. Freeman*. 3 T. R. 51. *Eyre v. Dunsford*, 1 East, 318. *Haycraft v. Creasy*, 3 East, 92. *Tap. v. Lee*, 3 B. & P. 367. where also the principles upon which this action is founded, are stated. As to declarations for deceit in general, see the notes to the last precedent, and 8 Wentw. Index, 28, 29. Com. Dig. Action for Deceit, F. 2. Bac. Abr. Action on the Case, E.

being a —, and so using, exercising and carrying on the said trade and business as aforesaid, one *E F* before the committing of the grievance by the said *C D*, as hereinafter next mentioned, to wit, on, &c. at, &c. aforesaid, applied to the said *A B*, and then and there requested the said *A B* to sell goods on credit to him the said *E F*, in the way of his the said *A B*'s said trade and business of a —. And the said *A B* being then and there unacquainted with the character and circumstances of the said *E F*, was then and there referred by him to the said *C D* for information respecting the same; whereof the said *C D* afterwards and before the sale of any goods by the said *A B* to the said *E F*, to wit, on, &c. at, &c. aforesaid, had notice from one *G H* the servant of the said *A B*, and the said *C D* was then and there interrogated by the said *J K*, on the part of the said *A B* respecting the character and circumstances of the said *E F*. Nevertheless the said *C D* well knowing⁽ⁱ⁾ the premises and that the said *E F* was then and there in bad and insolvent circumstances, and unfit to be trusted with goods on credit, but contriving and fraudulently intending craftily and subtly to deceive and injure the said *A B* in this behalf, on the day and *year aforesaid, at, &c. aforesaid, falsely, fraudulently and deceitfully⁽ⁱ⁾ informed the said *G H* in answer to certain questions then and there put to the said *C D* by the said *G H* on the part of the said *A B* respecting the character and circumstances of the said *E F*, that he the said *C D* knew the said *E F*, and had done a deal of business with him, and taken a deal of his (the said *E F*'s) money, and that he the said *C D* then did business with the said *E F*, and that upon the whole he the said *C D* believed the said *E F* to be a good man, (thereby then and there meaning that the said *C D* believed the said *E F* to be a man in good circumstances, and fit to be trusted with goods on credit.) By

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(i) As the *malò animo* is the gist of the action, the allegation of the *scienter* is in this case material, though we have seen in the case of warranty it is otherwise, *ante*, 276. and *Com. Dig.* Action Case, Deceit, F. 2. The term falsely or fraudulently, would however be sufficient, *id.* 1 Saund. 242. a. n. 2. 1 Mast, 563.

Deceit generally. means and in consequence of which information so given by the said *C D* to the said *G H* as aforesaid the said *A B* not knowing to the contrary, but believing therefrom that the said *E F*, was a man in good circumstances, and fit to be trusted as aforesaid, afterwards, to wit, on the day and year aforesaid, and on divers other days and times between that day and the — day of —, then next following, at, &c. aforesaid, was induced to give credit to the said *E F*, and did then sell and deliver to him divers goods on credit to a large amount, to wit, &c. to wit, at, &c. aforesaid, whereas in truth and in fact the said *E F* at the time of the said *C D* so giving the said information to the said *G H* as aforesaid, was in bad and insolvent circumstances, and not fit to be trusted with goods on credit. And whereas in truth and in fact the said *C D* did not at that time do business with the said *E F*. And whereas in truth and in fact the said *C D* did not believe the said *E F* to be a good man, but on the contrary thereof, at that time well knew the said *E F* then was in bad and insolvent circumstances, and not fit to be *trusted with goods on credit. And the said *A B* further says, that the said several sums of money are still wholly due and unpaid to the said *A B*, and he is likely wholly to lose the same, to wit, at, &c. aforesaid.

* 280

Second count
more general.

And whereas also the said *A B* before and at the time of the committing of the grievance by the said *C D* as hereinafter mentioned, carried on the trade and business of a —, and the said *E F* was desirous to deal with, and to be trusted by him the said *A B* for divers goods, wares and merchandises, on credit in the way of the said trade and business; and thereupon the said *C D* heretofore, to wit, on, &c. at, &c. aforesaid, again contriving and intending to deceive and defraud the said *A B*, and wrongfully, deceitfully and fraudulently to induce, persuade and encourage, him the said *A B* to deal with the said *E F* in the way of his said trade and business, and to sell and deliver to him the said *E F*, divers other goods, wares and merchandises, upon trust and credit, he the said *C D*, falsely, fraudulently and deceitfully, then and there *asserted and represented* to the said *A B* in substance, that he the said *A B* might safely trust and give credit to the said *E F* in that behalf, and that he the said *A B* might safely sell and deliver to the said

E F divers other goods, wares and merchandises, upon trust and credit. By means of which said last-mentioned false, fraudulent and deceitful assertion and affirmation, he the said *C D* did then and there fraudulently and deceitfully induce, persuade and encourage the said *A B* to deal with the said *E F* in the way of his said trade and business, and to trust and give credit to him in that behalf, and to sell and deliver to him the said *E F* divers goods, wares and merchandises, upon trust and credit. And the said *A B* in fact says, that he, confiding in, and giving credit to, the said last-mentioned assertion and representation of the said *C D*, and believing the same to be true, and not knowing the contrary thereof, did afterwards, to wit, on, &c. last aforesaid, and for a long time, to wit, until, &c. *deal with the said *E F* in the way of his said trade and business, and did trust and give credit to him in that behalf, and did sell and deliver to him divers other goods, wares and merchandises, to a large amount, to wit, &c. upon trust and credit, to wit, at, &c. aforesaid, whereas in truth and fact, at the time of the said *C D* making his said last-mentioned assertion and representation, he the said *A B* could not safely trust and give credit to the said *E F*, nor could he the said *A B* safely sell and deliver to the said *E F*, any goods, wares and merchandises, upon trust and credit, and the said *C D* when he so made his said last-mentioned assertion and representation, well knew the same, to wit, at, &c. aforesaid. And the said *A B* further says, that the said *E F* hath not, nor hath any other person on his behalf, paid to the said *A B*, the said last-mentioned sum of money so due to him for the said last-mentioned goods, wares and merchandises, or any part thereof, but on the contrary thereof he the said *E F* then was and still is, wholly unable to pay the same, or any part thereof, to the said *A B*, to wit, at, &c. aforesaid, and the said *A B* is likely to lose the same, to wit, at, &c. aforesaid. [*Conclude as ante*, 238.]

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[*Commencement as ante*, 238.]—For that whereas the said *A B*, heretofore, to wit, on, &c. at, &c. was lawfully possessed

Against the owner of a coach for the negligence of his servant in driving the same against the plaintiff's chaise. (k)

(k) See the precedents, 8 Wentw. N. P. tit. Consequential Damage. 5 Index, 47. As to the law, see Selwyn's Esp. Rep. 55. 44. When the action

*Negligence
in driving
carriages.*

* 282

of a certain chaise of great value, to wit, of the value of —£— and of a certain horse then and there drawing the same, and in which said chaise he the said *A B* was *then riding in and along a certain public and common highway. And the said *C D* was also then and there possessed of a certain coach and of divers, to wit, two horses, drawing the same and which said coach and horses were then and there under the care, government and direction of a certain then servant of the said *C D*, who was then and there driving the same, in and along the said highway, to wit, at, &c. aforesaid. Nevertheless the said *C D* then and there by his said servant so carelessly and improperly drove, governed and directed his said coach and horses, that by and through the mere carelessness, negligence and improper conduct of the said *C D*, by his said servant in that behalf, one of the hind wheels of the said coach of the said *C D* then and there ran and struck with great force and violence upon and against the said chaise of the said *A B* and thereby then and there crushed, broke to pieces, damaged and destroyed the same, and one of the wheels and the splinter bar and the shafts thereof, and the said chaise thereby then and there became and was rendered of no use or value to the said *A B*, and thereby he the said *A B* was then and there cast and thrown with great force and violence from and out of the said chaise to and upon the ground there, and by means of the several premises aforesaid, the said *A B* was then and there greatly bruised, hurt and wounded, and became and was sick, sore, lame and disordered and so remained and continued for a long space of time, to wit, hitherto, during all which time the said *A B* suffered great pain and was hindered and prevented

is against the party himself, who either wilfully or negligently drove the carriage and thereby occasioned the injury complained of, the remedy may and should be *trespass*, 3 East, 593. 600, 601. 1 East, 109. But when the action is against a master for the negligent driving of his servant, the action should be *case*, 1 East, 106. 109, 110. 2 Hen. Bl. 442. The declaration against the master for the act of his servant, should not

state it to have been committed wilfully, or forcibly, or furiously, but should shew that it was committed negligently, see 1 East, 106. and 3 East, 593. 6 T. R. 125. 5 T. R. 648. See the precedent, 2 Hen. Bl. 442. 6 T. R. 659. The negligence may be stated to be that of the master, without noticing the servant; but the above form is most correct, 6 T. R. 659. 1 East, 110.

from performing and transacting his lawful affairs and business by him during that time to be done and transacted. And also by means of the premises, was forced and obliged to pay, lay out and expend and hath necessarily paid, laid out and *expended, divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of 10*l.* in and about endeavouring to be healed and cured of his said wounds, hurt and bruises, occasioned as aforesaid. And also by means of the premises, he the said *A B* hath paid, laid out and expended, divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of —*l.* in and about the repairing of the said chaise so damaged as aforesaid, to wit, at, &c. aforesaid.—[*Add a count, stating that defendant himself negligently drove the carriage, 6 T. R. 659. 1 East, 110. and alleging the injury to the chaise less circumstantially, and conclude as ante, 238.*]

Negligence in navigating ships.

* 283

[*Commencement as ante, 238.*—For that whereas the said *A B*, before and at the time of the committing of the grievance by the said *C D*, as hereinafter next mentioned, was lawfully possessed of a certain barge or vessel, of great value, to wit, of the value of —*l.* then lawfully being in the river *Thames*, to wit, at, &c. (*the venue*) and the said *C D* was also then possessed of a certain other barge or vessel in the river *Thames* aforesaid, to wit, at, &c. aforesaid, and then and there had the care, direction and management of the same. Yet the said *C D* not regarding his duty in that behalf, whilst the said barge or vessel of the said *A B* so was in the river *Thames* aforesaid, to wit, on, &c. at, &c. aforesaid, took so little and such bad care of his said barge or vessel in the direction and management of the same, that the same, by and *through the carelessness, misdirection and mismanagement of the said

Against the owner of a ship for negligence in the navigation of it, whereby the plaintiff's barge was damaged. (1)

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(1) See the precedents, 8 Wentw. Index, 46, 47. 5 T. R. 649. 1 B. & P. 472. 8 T. R. 188. The injury may be stated to have been occasioned by the negligence of the defendant himself, though in fact he were not present, 1 East, 110. 6 T. R. 659. In an action against the party himself, who has occasioned an injury by improperly driving a carriage, the remedy is *trespass, ante, 281. n. (k)*, but *case* may be supported for the consequences of negligence in the navigation of a ship, *Leame v. Bray*, 3 East, 599. 601. 8 T. R. 188. 1 B. & P. 472.

*Negligence
in navigating
ships.*

C D, (or if he were not on board, "by his servants in that behalf;") then and there with great force and violence ran foul of and struck against the said barge or vessel of the said *A B*, and thereby then and there greatly broke, damaged and injured the same, and thereby divers goods, wares and merchandises, to wit, &c. of the said *A B* of great value, to wit, of the value of —*l.* then being on board of the said barge or vessel of him the said *A B*, then and there became and were greatly wetted, damaged and spoiled; and also by reason of the premises, he the said *A B* hath been forced and obliged to pay, lay out and expend, and hath necessarily paid, laid out and expended a large sum of money, to wit, the sum of —*l.* in and about the repairing the said damage so done to the said barge or vessel as aforesaid, and also by means of the premises he the said *A B* lost and was deprived of the use of the said barge, or vessel of him the said *A B*, for a long space of time, to wit, for the space of —, and thereby lost and was deprived of all the profits and advantages which during that time he might, and also otherwise would, have derived and acquired from the use of his said barge or vessel, to wit, at, &c. aforesaid. [*Add a second or other counts, varying the statement of the injury according to the circumstances of the case, as they may be probably established in evidence, and conclude as ante, 238.*]

*Illegal Dis-
tresses.*

At common law, though a distress for rent or *damage-feasant* were legal in its inception, yet if there were any subsequent irregularity, the parties became trespassers *ab initio*, *Bac. Abr. tit. Trespass, B. 8 Co. 146*. And in the case of a distress for *damage-feasant*, this is still the law; but the 11 *Geo. II. c. 19. s. 19* alters the common law in this respect, and enacts, that "where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distressing, or by his, her, or their agents, the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it, be deemed a trespasser or trespassers *ab initio*; but the party or parties aggrieved by such unlawful act or irregularity, shall or may recover full satisfaction for the special da-

"mage he, she or they shall have sustained thereby, and no more, in an action of trespass, or on the case at the election of the plaintiff or plaintiffs: Provided always, That where the plaintiff or plaintiffs shall recover in such action he she or they shall be paid his, her or their full costs of suit, and have all the like remedies for the same, as in other cases of costs." Therefore since this act, trover will not lie where the distress has been merely irregularly sold; 1 *H. B.* 13. nor trespass, unless for some act which of itself might be the subject matter of that form of action. If, however, the distress were illegal in its inception, or if the person making the distress turned the tenant out of possession, trespass may be supported; 1 *East*, 139. In declaring specially for any irregularity, it is not necessary to state a demise, or that the goods were distrained for rent arrear, and it is sufficient to allege that the goods were taken *nomine districtionis*; 4 *Mod.* 231.

Illegal distresses.

[Commencement as ante, 238.] For that whereas the said *A B* after the making of a certain act of parliament, entitled, "An act for enabling the sale of goods distrained for rent, in case the rent be not paid in a reasonable time," and before and at the time of the committing of the grievance by the said *C D* as hereinafter mentioned, held and enjoyed a certain messuage, farm, lands and premises, with the appurtenances, situate, &c. as tenant thereof to the said *C D*, at and under a certain rent, therefore payable* by the said *A B* to the said *C D*, to wit, the rent of —*l.* per annum. Yet the said *C D* not regarding the statute in such case made and provided, but contriving wrongfully, and injuriously intending to harass, oppress, and injure the said *A B* in this behalf, heretofore, to wit, on, &c. at, &c. by colour of the said act, wrongfully and injurious-

On 2 W. & M. sess. 1. c. 5. s. 5. for double value of goods distrained where no rent was due.(m)

* 286

(m) When no rent is due, the owner of the goods distrained may in an action of trespass or case, recover double the value of the goods and full costs. 2 W. and M. sess. 1. c. 5. s. 5. See the precedent, 8. Wentw. 429. but the terms of the tenancy appear to be there stated more fully than is necessary, *Bristow v. Wright*, Doug.

665. 5 T. R. 497. 5 Esp. Rep. 38. See *Salter v. Bruntsden*, 4 Mod. 231. in which the declaration was more concise than that above, and it was held unnecessary to state a demise in form, and sufficient to say, that the goods were taken "*nomine districtionis*;" Com. Dig. Distress, D. 9.

Illegal distresses.

ly seized, took, and distrained in and upon the said tenements, with the appurtenances, divers goods and chattels of the said *A B* of great value, to wit, of the value of —*l.* and afterwards, to wit, on the — day of —, sold the said goods and chattels as such distress as aforesaid, by colour of the said act, for certain rent, to wit, the sum of —*l.* then and there pretended by the said *C D* to be in arrear and due to the said *C D* for the said demised tenements, with the appurtenances; whereas in truth and in fact, at the time of the making of the said distress, and the said sale as aforesaid, no rent was in arrear or due to the said *C D*, for or in respect of the said tenements, with the appurtenances, contrary to the form of the statute in that case made and provided. [*If the above count be framed in case, add a count in trover, and if in trespass, add a count de bonis asportatis, and conclude, if in case, as ante, 238.*]

On stat. Marl.
51 Hen. III.
c. 4. for distraining beasts of the plough, and sheep, there being other goods sufficient to distrain. (n)

[*Commencement as ante, 238.*] For that whereas the said *C D*, on, &c. at, &c. took and distrained the beasts of the plough, and sheep of the said *A B*, to wit, &c. then being in and upon certain land and premises, with the appurtenances of the said *A B*, situate, &c. and whereby and wherewith he the said *A B* then tilled his said land, not for *damage-feasant*, but for certain rent, to wit, the sum of —*l.* then supposed to be due and owing from the *said *A B* to the said *C D* for and in respect of the said land and premises, with the appurtenances, although there were then and there other goods and chattels of the said *A B* in and upon the said land and premises, with the appurtenances, not being beasts of the plough or sheep, sufficient for a reasonable distress for the rent aforesaid, and the said *C D* afterwards, to wit, on, &c. at, &c. aforesaid, sold the said beasts of the plough, and the said sheep, and converted and disposed of the money arising from the sale thereof, to the use of him the said *C D* contrary to the form of the statute in such case made and provided. [*Add a count in trover and conclude as ante, 238.*]

* 287

(n) See the precedents, 8 Wentw. 4 T. R. 565. 1 Bott. 244. Gilb. 430. 443, 444. The first was in trespass, and both the precedents conclude against the peace. As to the law, see Com. Dig. tit. Trespass, c. 4. Dist. by Hunt, 36. Co. Lit. 47. a. n. 117. The declaration need not shew that there was a sufficient distress of other goods. Dyer, 312. Sid. 348.

[*Commencement as ante*, 238.] For that whereas the said *A B* before and at the time of the committing of the grievance hereinafter next mentioned held and occupied certain premises, with the appurtenances, situate and being in, &c. as tenant thereof to the said *C D* at and under a certain rent therefore payable by the said *A B* to the said *C D*, to wit, at, &c. aforesaid. Yet the said *C D* contriving and maliciously intending wrongfully and unjustly to injure the said *A B* in this behalf, heretofore, to wit, on, &c. at, &c. aforesaid, falsely and maliciously pretending that a certain large sum of money, to wit, the sum of —*l.* of lawful money, &c. was then due and in arrear from the said *A B* to the said *C D* for rent of the said premises, with the appurtenances, wrongfully and unjustly seized and took certain cattle, to wit, &c. of the said *A B* then found and being in and upon the said laid last-mentioned premises, of great value, to wit, of the value of —*l.* of lawful money of *Great Britain*, as a distress for the said sum of money so pretended to be due and in arrear as aforesaid, and under that pretence kept *and detained the said cattle of the said *A B* from him the said *A B* for a long space of time, to wit, for the space of — days then next following, and until he the said *A B* in order to regain the possession of his said cattle, was forced and obliged to pay, and did pay to the said *C D* the said pretended arrears of rent, and a large sum of money, to wit, the sum of —*l.* for the costs and charges of the said distress and expenses incidental thereto. Whereas in truth and in fact, at the time of the making of the said distress as aforesaid, and during all the time aforesaid, a small part only, to wit, the sum of —*l.* of the said sum of money so pretended to be due and in arrear as aforesaid, was due and in arrear from the said *A B* to the said *C D* for the rent of the said tenements, with the appurtenances, to wit, at, &c. aforesaid. [*Add a count for an excessive distress for the rent really due, as in the next precedent, and a count in trover, and conclude as ante*, 238.]

Illegal distresses.
For distraining for more rent than was due.(o)

* 288

(o) This action is at common law, on the statute 2 W. & M. c. 5. s. 6. and is not founded upon the statute 52 Hen. III. c. 4. for an excessive distress, as in the next precedent, nor

Illegal distresses.

For taking an excessive distress for rent, on stat. Marl. 52 Hen. III. c. 4. (p)

[Commencement as ante, 238.] For that whereas the said *A B* before and at the time of the committing of the grievance hereinafter next mentioned, held and enjoyed certain land and premises, with the appurtenances, situate, &c. as tenant thereof to the said *C D* at and under a certain rent therefore payable by the said *A B* to the said *C D* for the same, of which said rent, at the time of the committing of the grievance hereinafter next mentioned, a certain small sum of money, to wit, the sum of —*l.* and no more, was due and in arrear from the said *A B* to the said *C D*. Yet the said *C D* not regarding the statute in such case made and provided, but wrongfully and maliciously contriving and intending to injure and oppress the said *A B* in this behalf, heretofore, to wit, on, &c. at, &c. aforesaid, wrongfully and maliciously took and *distraigned for the said arrears of rent certain goods and chattels, to wit, &c. of the said *A B*, of much greater value than the amount of the said arrears of rent, to wit, of the value of —*l.* and thereby took a great and unreasonable distress for the said arrears of rent, when at the time of the taking of the said distress as aforesaid, a certain part of the said goods and chattels so distraigned as aforesaid, to wit, one half thereof then was of sufficient value to have satisfied the said arrears of rent and the charges of the said distress and of the appraisement and sale thereof, to wit, at, &c. aforesaid, contrary to the form of the statute in such case made and provided. [Add a count in trover, and conclude as ante, 238.]

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[In the English edition, pages 287, 288. have been duplicated, and pages 318, 319. omitted. It has been thought proper to follow the English paging.

For driving a distress above three miles out of a hundred, 1 & 2 P. & M. c. 12. (7)

For that whereas the said *C D*, heretofore, to wit, on, &c. in the hundred of —, in the county of —, to wit, at, &c. took and distraigned divers cattle, to wit, — of him, the said *A B* of great value, to wit, of the value of —*l.* as and for, and in the name of a distress for certain rent, and the said *C D*,

(p) See also 51 Hen. III. c. 4. Gilb. Dist. by Hunt, 63 to 68. The remedy must be on the above stat. 2 Stra. 851. 3 Lev. 48. and not by trespass or trover. *id. ibid.* See the precedent, 8 Wentw. 439. 444.

(q) See the precedent, Co. Ent. 43. b. Hast. 164. the party might also proceed on 52 Hen. III. c. 4. The statute entitles the party aggrieved to 5*l.* and treble damages.

not regarding the statute in such case made and provided and contriving to injure and aggrieve the said *C D*, afterwards, to wit, on the same day and year last aforesaid, drove the said last-mentioned distress out of the said hundred, in which the said distress was so taken as aforesaid, into a certain other hundred, to wit, the hundred of —, in the county aforesaid, and to a place above three miles, to wit, twelve miles distant from the place where the same was so taken as aforesaid, that is to say, to —, in contempt of our said lord the king and his laws, and against the form of the statute in such case made and provided.

Illegal distresses.

* 288

[*Commencement as ante*, 238.]—For that whereas the *said *C D*, heretofore, to wit, on, &c. at, &c. seized and took divers goods and chattels, to wit, &c. of the said *A B*, of great value, to wit, of the value of —*l.* then found and being in a certain messuage or tenement, with the appurtenances, situate, &c. as and for, and in the name of a distress for certain supposed arrears of rent, to wit, for the sum of —*l.* pretended to be due and in arrear from the said *A B* to the said *C D*, for and in respect of the said messuage or tenement, with the appurtenances, and then and there carried away and removed the said goods and chattels, and impounded the same off the said messuage or tenement, with the appurtenances. Nevertheless the said *C D* contriving, and wrongfully and unjustly intending to injure the said *A B*, and not regarding the statute in such case made and provided, did not, nor would, give due and proper notice of the said distress, and of the cause of taking the same, or of the place to which the said goods and chattels were removed, to the said *A B*, or leave the same at the said messuage or tenement, with the appurtenances, but wholly neglected so to do, and therein failed and made default, contrary to the form of the statute in such case made and provided, and to the damage, &c.

For impounding goods distrained off the premises, and not giving the tenant notice.
(r)

(r) 2 W. & M. c. 5, s. 2. 11 Geo. *Moss v. Gallimore*. Dougl. 279. 1d. H. c. 19. s. 10. As to what notice is Raym. 54. 1 Hen. Bl. 13. Gilbert's necessary, and how, to be given, see *Distresses*, by Hunt, 76. &c.

Illegal distresses.

For refusing to restore goods distrained for rent, on tender of the rent and costs. (*)

* 289

[Commencement as ante, 238]—For that whereas the said *C D*, heretofore, to wit, on, &c. at, &c. had taken and distrained divers goods and chattels of the said *A B*, of great value, to wit, of the value of —*l.* there then found *and being, as and for and in the name of a distress for certain rent, to wit, the sum of —*l.* then due and in arrear from the said *A B* to the said *C D*, for and in respect of a certain messuage, with the appurtenances, before then held and occupied by the said *A B*, as tenant thereof to the said *C D*, and thereupon afterwards, and whilst the said *C D* was in possession of the said last-mentioned goods and chattels, under such distress as aforesaid, to wit, on, &c. aforesaid, at, &c. aforesaid, tendered and offered to the said *C D*, in satisfaction and discharge of the said arrears of rent and the costs and charges of the said distress, a certain large sum of money, to wit, the sum of —*l.* the same being then and there a sufficient sum to satisfy and discharge the said arrears of rent, together with all the costs and charges of the said distress, and then and there requested the said *C D* to redeliver and restore the said goods and chattels to him, the said *A B*, and although the said *C D*, then and there ought to have accepted and received the said sum of money from the said *A B*, in discharge of such arrears of rent and the costs and charges of the said distress, and to have redelivered and restored the said goods and chattels to him the said *A B*; yet the said *C D* contriving, and wrongfully and unjustly intending to harass, oppress and aggrieve the said *A B* in this behalf, did not, nor would, when he was so requested as aforesaid, or at any other time, accept or receive the said sum of money from the said *A B*, in satisfaction and discharge of the said arrears of rent and the cost and charges of the said last-mentioned distress, or redeliver or restore the said goods and chattels, or any part thereof, to the said *A B*; but then

(*) See the precedent, 8 Wentw. 440. and the like in the case of a distress damage-feeasant, *id.* 392. According to 5 Co. 147. a. Gilbert's Dist. by Hunt, 57. 88. tender upon the land before the distress makes the distress tortious; tender after the distress, and before the impounding, makes the detainer and not the taking wrongful; tender after the impounding makes neither the one nor the other wrongful; but in the case of a distress for rent, upon the equity of the statute 2 W. & M. c. 5. a sale of the distress, after tender of the rent and costs would be illegal.

and there wholly neglected and refused so to do, and hath hitherto wrongfully and injuriously kept and withheld the said last-mentioned goods and chattels from the said *A B*, and hath converted and disposed thereof to his own use to wit, at, &c. aforesaid. [*Add count in trover.*]

Illegal distresses.

* 290

For that whereas the said *C D* heretofore, to wit, on, &c. at, &c. seized and took divers goods and chattels, to *wit, &c. of the said *A B*, of great value, to wit, of the value of —*l.* then found and being in and upon a certain farm, lands and premises, situate, &c. in the name of a distress for certain arrears of rent, pretended to be due and payable for the same to him the said *C D*, and then and there gave notice thereof to the said *A B*,^(t) yet the said *C D* not regarding the statute in such case made and provided, and contriving and wrongfully and unjustly intending to injure the said *A B* in this behalf, and to deprive him of his said goods and chattels, and of the use, benefit and advantage thereof, and to prevent him from replevying the same, afterwards, and before the expiration of five days next after such distress so taken and made, and such notice thereof so given as aforesaid, to wit, within the space of five days thence next following, to wit, on, &c. aforesaid, at, &c. aforesaid, wrongfully, unlawfully and unjustly did sell and dispose of the said goods and chattels, without the leave or license, and against the will of the said *A B*, whereby he the said *A B* was not only hindered and prevented from replevying the said goods and chattels so distrained as aforesaid, but was also deprived of such reasonable and sufficient time as in that respect is allowed by law, for the raising, obtaining and procuring money to pay and discharge the rent so pretended to be due and in arrear as aforesaid, and the costs of the said distress; and the said *A B* hath also thereby wholly lost and been deprived of the said goods and chattels, and of the use, benefit and advantage thereof, to wit, at, &c. aforesaid.

For selling a distress within five days, on the equity of 2 W. & M. c. 3.

(t) This is not necessary, Lutw. 214.

Illegal distresses.

For not removing goods distrained within a reasonable time after the elapse of the five days. (u)

* 291

[Commencement as ante, 238.] For that whereas the said *C D* heretofore, to wit, on, &c. at, &c. seized and took divers cattle, goods and chattels, *to wit, &c. of the said *A B*, of great value, to wit, of the value of —*l.* then found and being in and upon a certain farm, lands and premises of the said *A B*, situate, &c. in the name of a distress for certain arrears of rent pretended to be due and payable for the same to him, the said *C D*, and then and there gave notice thereof to the said *A B*; yet the said *C D* not regarding the statute in such case made and provided, but contriving, and wrongfully and unjustly intending to injure the said *A B* in this behalf, did not, nor would, remove the said last-mentioned cattle, goods, and chattels from the said last-mentioned farm, lands and premises, within a reasonable time after the expiration of five days next, after the making of the said last-mentioned distress, and giving the said notice thereof as aforesaid, but wholly neglected and refused so to do, and wrongfully and unjustly, without the license or consent, and against the will of the said *A B* kept and detained the said last-mentioned cattle, goods, and chattels in and upon the said farm, lands and premises, for a great and unreasonable space of time after the expiration of the said five days as aforesaid, to wit, for the space of — then next following, contrary to the form of the statute in such case made and provided, to wit, at, &c. aforesaid.

For not selling for the best price on the equity of stat. 2 W. & M. c. 5. s. 2. (x)

[Commencement as ante, 238.]—For that whereas heretofore, to wit, on, &c. at, &c. the said *C D* seized and distrained divers goods and chattels, to wit, &c. of him the said *A B* of great value, to wit of the value of —*l.* of lawful, &c. then found and being in and upon a certain messuage or dwelling-house, with the appurtenances, situate at, &c. as for and in the name of a distress for certain arrears of rent alleged to be due to the said *C D* for the use and occupation of the said last-

(u) This count founded on the equity of the 2d W. & M. c. 5. s. 2. and 11 Geo. II. c. 19. s. 10. has frequently been adopted, but *quare* if trespass is not the proper form of action, where the party distraining continues too long in possession. *Str.* 717. 1 Hen. Bl. 15. Gilb. 77.

(x) The price at which the goods were distrained will be presumed to be the best that could be obtained till the contrary be proved. 4 Mod. 399. Com. Dig. Distress, D. 8.

mentioned messuage, *or dwelling-house, in which, &c. And *Illegal distress.* whereas also the said *C D* afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, sold a part of the said goods and chattels for payment and satisfaction of the said supposed arrears of rent, and of the charges of the said distress. Yet the said *C D* not regarding his duty in making and selling the said distress, nor the statute in such case made and provided, but contriving and fraudulently intending craftily and subtly, to injure the said *A B* in that behalf, did not, nor would sell the said goods and chattels under the said distress for the best price that could be gotten for the same, but on the contrary thereof, the said *C D* then and there, to wit, on, &c. aforesaid, wrongfully and injuriously sold the said goods and chattels for much less than the best price, that is to say, for —*l.* less than the best price which might have been gotten and received for the same, had the same been sold in a due and proper manner by the said *C D*, to wit, at, &c. aforesaid. [*Add a count in trover, and conclude as ante, 238.*]

[*Commencement as ante, 238.*] For that whereas heretofore, On equity of stat. 2 W. & M. c. 5. s. 2. for not leaving the overplus arising from the sale of a distress with the sheriff, &c.

to wit, on, &c. at, &c. the said *C D* seized and distrained divers goods and chattels, to wit, &c. of him the said *A B*, of great value, to wit, of the value of —*l.* of lawful, &c. there then found and being in and upon a certain messuage, or dwelling-house, with the appurtenances, situate, &c. as and for, and in the name of a distress for certain arrears of rent alleged to be due to the said *C D* for and in respect of the said messuage or dwelling-house. And whereas also the said *C D* having caused the said goods and chattels to be appraised afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, sold a part of the said goods and chattels so by him seized and distrained as aforesaid, for payment and satisfaction of the said supposed arrears of rent, and of the charges of the said distress, appraisement, and sale for divers sums of money, amounting in the whole to a certain sum of money, *to wit, the sum of —*l.* of lawful money of *Great Britain*, being a much larger sum of money than was sufficient to satisfy and discharge all the rent then due for the said messuage or dwelling-house, with the appurtenances, and all the charges of the said distress, appraisement and sale. And the said *A B* further saith, that although the said *C D*, afterwards, to wit, on, &c. last aforesaid,

Illegal distresses.

at, &c. out of, and with a part of the produce of the said goods, and chattels, so by him sold as aforesaid, satisfied the said rent, for which the said goods and chattels were so distrained as aforesaid, and the charges of the said distress, appraisement and sale, leaving a great and considerable overplus of the money produced by the said sale; yet the said *C D* not regarding his duty in that behalf, nor the statute in such case made and provided, but contriving and fraudulently intending to deceive and defraud the said *A B* in this behalf, did not, after satisfaction of the rent for which the said goods and chattels were so distrained as aforesaid, and of the charges of the said distress, appraisement and sale, out of the produce of the said goods and chattels so sold as aforesaid, leave the overplus thereof in the hands of the sheriff, or under-sheriff, of the said county of —, or either of them, or of the constable of the parish where the said distress was so taken as aforesaid, for the use of the said *A B* so being the owner of the said goods and chattels as aforesaid, although a reasonable time for that purpose hath long since elapsed, but the said *C D* hath hitherto wholly neglected and refused so to do, and therein wholly failed and made default, and he the said *A B* hath not received or been in any way satisfied for such overplus as aforesaid, contrary to the form of the statute in such case made and provided, to wit, at, &c. aforesaid.

* 294

For rescue of distress for rent, on a common appurtenant, (y) under statutes 2 W. & M. c. 5. s. 4. 11 Geo. II. c. 19. s. 10.

[Commencement as ante, 238.] For that whereas the said *C D* for a long space of time, to wit, for the space *of — next before, and ending on, &c. and from thence until, and at the time of committing the several grievances hereinafter mentioned, held and enjoyed a certain farm and lands with the appurtenances, situate, &c. that is to say, as tenant thereof to the

(y) See the precedents, 8 Wentw. Index, 24. 3 Ld. Raym. 177. 1 Ld. Raym. 170. Lutw. 213. The stat. 2 W. & M. sess. 1. c. 5. s. 4. enacts, "that upon any pound breach or rescue of goods or chattels distrained for rent, the person thereby aggrieved shall in a special action on the case, for the wrong thereby sustained, recover treble damages and costs

(which also are treble, Carth. 321. t Salk. 205.) against the wrong-doer or the owner of the goods distrained, in case the same be afterwards found to have come to his use or possession." The 11th Geo. II. c. 19. enlarges the powers of distress, and extends the above provision, see sect. 10. Trespass may be supported at common law. Com. Dig. tit. Rescous, D. 1.

said *A B* under and by virtue of a certain demise thereof, therefore made to him the said *C D* at and under a certain yearly rent, to wit, the yearly rent of —*l.* therefore payable by the said *C D* to the said *A B*, on, &c. and on, &c. by even and equal portions(*z*) of which said rent a certain sum of money, to wit, the sum of —*l.* of lawful, &c. on the said, &c. aforesaid, became due and payable, and from thence until, and at the time of committing the several grievances hereafter mentioned was in arrear and unpaid from the said *C D* to the said *A B*, to wit, at, &c.. aforesaid. And whereas the said *A B* heretofore, to wit, on, &c. by one *E F* his bailiff in that behalf had, according to the form of the statute(*a*) in such case made and provided, seized and taken divers, to wit, two cows then feeding and depasturing in *and upon a certain common field, or piece or parcel of land, situate, lying and being in, &c. aforesaid, the same being then and there common appurtenant to, and belonging to the said demised premises, as for and in the name of a distress for the said sum of —*l.* of the rent aforesaid so in arrear and unpaid as aforesaid. And the said *A B* and his said bailiff were then and there driving the said cows to a certain common pound, situate and being at, &c. and within three miles from the place where the same were so taken as aforesaid, and would there have impounded the same, with intent to appraise and sell and dispose of the said cows, according to the form of the statute in such case made and provided, whereupon he the said *C D*, on, &c. last aforesaid, at, &c. aforesaid, with force and arms, (*b*) &c. rescued, seized, took and drove away the said cows, contrary to the form of the statute in such case made and provided, whereby he the said *A B* hath been and is greatly delayed in the recovery of the said rent so in arrear as afore-

*Rescue and
pound breach.*

* 295

(*z*) As the statute 2 W. & M. c. 5. gives the action only to the party grieved; it seems necessary in a declaration for treble damages on this statute, to state the right to distrain, though in an action for a pound breach of a distress taken *damage-feasant*, the title needs not be stated, 1 Ld. Raym. 104. 1 Salk. 247. The precedents in Lutw. 213. 3 Ld. Raym. 177. Mod. Ent. 210. state the demise fully, and it is said that the days of payment of the rent

ought to be alleged. Kitt. 227. a. Com. Dig. Pleading, c. 19. Bull. N. P. 61. 8 T. R. 130. but, to avoid a variance, no unnecessary terms of the tenancy should be stated. Doug. 665.

(*a*) By the 11th Geo. II. c. 19. s. 8. a distress may be made upon a common appendant or appurtenant.

(*b*) Though the action given by the statute is case, yet the injury is stated *vi et armis*, Lutw. 213. Ld. Raym. 177.

*Rescue and
pound breach.*

said, and deprived of the means of obtaining satisfaction thereof, and of the costs and charges of the said distress, and is likely to lose the same, to wit, at, &c. aforesaid.

Second count
for a pound
breach. (c)

* 296

And whereas also the said *A B*, on, &c. aforesaid, at, &c. aforesaid, by the said *E F* his bailiff in that behalf, had seized and taken divers goods and chattels, to wit, &c. in a certain barn, parcel of the said farm, with the appurtenances, as for and in the name of a distress for the said sum of —*l.* of the rent aforesaid so in arrear and unpaid as aforesaid, and had impounded and secured the *said goods and chattels in the said barn, (being the most fit and convenient part of the said demised premises for that purpose,) with intent to appraise and sell, and dispose of the said goods and chattels according to the form and effect of the statute in such case made and provided, (d) whereupon he the said *C D* on the same day and year last aforesaid, at, &c. aforesaid, with force and arms, &c. broke the said pound, and rescued the said last-mentioned goods and chattels, contrary to the form of the statute in such case made and provided. Whereby, &c. [*state the damage as in first count, and add a count in trover, and conclude as ante, 238.*]

For rescuing
cattle taken
damage-feas-
ant. (e)

For that whereas heretofore, to wit, on, &c. at, &c. the said *A B*, by *E F*, his bailiff in that behalf, had taken in a certain

(c) See the notes to the last precedent, and 5 T. R. 432. from which it appears that it is no answer to this action that the rent and costs were tendered after the distress and impounding. As to pound breach being indictable, see 2 Hawk. c. 10. s. 56. 4 Leon. 12. Gilb 75. Crown Cir. Ass. 299. Com. Dig. tit. Rescous, D. 3.

(d) It is not necessary to state that notice of the distress was given, Ld. Raym. 170. Lutw. 214.

(e) See Com. Dig. tit. Distress, D. 2, 3. and the precedents, 8 Wentw. Index, 24. Lutw. 1259. Rescued and pound breach may be joined, Ld. Raym. 83. As to the *venue* F. N. B. 101. E. n. c. Bull. N. P. 63. The remedy for the

rescue of a distress *damage-feasant* is, at common law, either by writ of rescous, Com. Dig. tit. Rescous, D. 1. or by action on the case for the consequential damage which is laid, nevertheless, *vi et armis*, and may be joined with any other demand either in case or trespass, Lutw. 1259. Ld. Raym. 83. 104. Tidd's Prac. 11. n. u. In an action for a rescue, as well as for a pound breach, it is usual to shew the cause of the distress; but in the latter case as the distress is but inducement to the action, and the breach of the pound is the gist of it, therefore it is not necessary to shew the cause of the distress, Ld. Raym. 105. Rast. Ent. 444.

close of him the said *A B*; situate at, &c. certain cattle, to wit, &c. doing damage to him the said *A B* there, and was then and there by his said bailiff in that behalf about to impound the said cattle for the cause aforesaid. Yet the said *C D* well knowing the premises, but wrongfully and injuriously contriving and intending to injure the said *A B* and to deprive him of the benefit of the said distress, afterwards, to wit, on, &c. aforesaid, at &c. aforesaid, unlawfully and against the will of the said *A B*, with force and arms rescued the said cattle, and took the same from the said *E F*, and thereby prevented him the said *E F* from impounding the same, as he otherwise lawfully might and would have done, to wit, at, &c. aforesaid; by means of which said premises he the said *A B* hath been and is greatly injured and deprived of the said means of obtaining compensation for the damage so done and doing, by the said cattle as aforesaid, to wit, at, &c. aforesaid. [*If the declaration be framed in case, a count in trover may be added, and if in trespass, a common count for the damage to the land should be joined.*]

Rescue and pound breach.

* 297

For that whereas heretofore, to wit, on, &c. at, &c. when he the said *A B* had then and there taken and distrained certain cattle, to wit, —, in a certain close of him the said *A B*, situate, &c. treading down, trampling upon, spoiling and consuming the grass growing in his said close, and doing damage therein to him the said *A B*, and had impounded the said cattle in a certain common and open pound, in, &c. aforesaid, as a distress for the said damage, according to the law and custom of *England*, he the said *C D*, with force and arms, &c. afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, broke and entered the said common and open pound, and rescued and took away from and out of the said pound, the said cattle so impounded therein as aforesaid. Whereby, &c. [*state the damage as in the last count, and add other counts as there directed.*]

For pound breach, cattle taken damage-feasant. (f)

(f) See the notes to the last precedent, 8 Wentw. Index, 24. Lutw. 1259. Ld. Raym. 104. It is most usual to join this count with a count in trespass for *damage-feasant*, when the action is against the owner of the cattle.

For a rescue
of a person
arrested on a
mesne pro-
cess. (g)

* 298

[As in the declaration for an escape, post, 299, 300, to the end of the statement of the delivery of the writ to the sheriff, and *then state the sheriff's warrant and arrest and rescue as follows:] And thereupon the said *G H* so being such sheriff as aforesaid, afterwards and before the return of the said writ, to wit, on, &c. last aforesaid, at, &c. aforesaid, made his certain warrant in writing, under his seal^(h) of office, of sheriff of the said county of — as aforesaid, directed to the keeper of the gaol of the said county, and to *J K* and *L M* the said sheriff's bailiffs, and thereby commanded them jointly and severally that they should take the said *E F* if he should be found in his the said sheriff's bailiwick, and safely keep him so that he the said sheriff might have the body of the said *E F* before our said lord the king, at *Westminster* aforesaid, on, &c. to answer the said *A B* in a plea, and to the bill in the said last-mentioned writ mentioned, which said last-mentioned warrant afterwards and before the return of the said writ, to wit, on, &c. aforesaid, at, &c. aforesaid, was delivered to the said *J K* and *L M* to be executed according to due form of law. By virtue of which said writ and warrant the said *J K* and *L M* before the time appointed for the return of the said writ, to wit, on, &c. and within the bailiwick of the said sheriff, to wit, at, &c. took and arrested the said *E F* by his body, and had him in their custody for the cause in the said writ and warrant mentioned. Nevertheless the said *C D* well knowing the premises, but contriving to injure the said *A B* and to deprive him of *the means of recovering his said debt, afterwards and whilst the said

* 299

(g) See the precedents, 8 Wentw. Index, 24. 8 T. R. 197. Com. Dig. tit. Rescous, D. 2. Bac. Abr. tit. Rescous. If it be doubtful whether an actual arrest can be proved, a count should be added for obstructing the sheriff in making the arrest, F. N. B. 102. F. Com. Dig. Rescous, B. If the rescue be upon final process, the declaration should state the judgment—the *ca. sa.* and the delivery thereof to the sheriff, as *ante*, 147 to 149. and then the warrant—the arrest—and the rescue may be stated

nearly as in the above precedent. See the precedents on final process, 8 Wentw. Index. 24. It does not seem necessary in a declaration for a rescue either on mesne or final process, to state the warrant to the bailiff; it may be stated that the sheriff arrested the party, and that the rescue was from his custody, and this seems preferable. Cro. Jac. 242. 48. Com. Dig. tit. Rescous, D. 2.

(h) It is not necessary to state that the warrant was under seal. Cro. Eliz. 53. Palm. 357. 2 Saund. 305. b..

E F was so in the custody of the said *J K* and *L M* as aforesaid, and before the return of the said writ, to wit, on, &c. last aforesaid, at, &c. aforesaid; rescued the said *E F* from and out of the custody of the said *J K* and *L M*, and caused the said *E F* to escape and go at large, and the said *E F* did thereby then and there escape and go at large out of the said custody of the said *J K* and *L M*, whosoever he would, the said *A B* not then nor yet being paid or satisfied his said debt, and by means of the premises, the said sheriff could not have the body of the said *E F* before our said lord the king, at Westminster, at the return of the said writ, nor did the said *E F* appear in the said court at the return of the said writ according to the exigency thereof, but therein wholly failed and made default, (i) whereby the said *A B* hath been and is greatly injured and delayed in the recovery of his aforesaid debt, and is likely to lose the same; and thereby also he the said *A B* hath lost and been deprived of the means of recovering his costs and charges by him paid, laid out and expended in and about his said suit so commenced and prosecuted against the said *E F* as aforesaid, amounting together to a large sum of money, to wit, the sum of —l. to wit, at, &c. aforesaid.

Rescue of persons.

[Commencement as ante, 238.] For that whereas one *E F* heretofore, to wit, on, &c. (l) at, &c. (m) was indebted *to the said *A B* in a large sum of money, to wit, the sum of —l. of lawful, &c. for (n) so much money by the said *E F* before that time

For an escape on mesne process, (k)

* 300

(i) This allegation of the non-appearance of the defendant, does not appear to be necessary, 8 T. R. 127. Post, 501. n. (p).

(k) See the precedents, 8 Wentw. Index, 33. 2 Saund. 150. Bac. Abr. Escape, F. G. When the escape is on mesne process, or where there has been no caption on final process, case is the only remedy, and the jury may give merely nominal damages, 1 Saund. 37, 38. n. 2. Ante, 147. n. (a). Bac. Abr. Escape, F. Where see the precedent in debt, and 2 Saund. 150.

(l) In order to avoid an unnecessary statement of different days, it is advisable here to insert the teste of the writ, or the day it issued, and the former is preferable, ante, 162. n. (h) and (i).

(m) The venue is transitory, 1 Wils. 356. Plowd. 35. Dyer, 278. b. Bac. Abr. Escape, F.

(n) It must be stated and proved that the plaintiff had a cause of action against the party arrested, 4 T. R. 611. 2 Lev. 85. 2 Saund. 151. n. 1. 1 Saund. 33. It has been usual to state as in the above precedent, the subject

For escapes, &c. had and received, to and for the use of the said *A B*; and being so indebted, he the said *E F* in consideration thereof, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, undertook and faithfully promised the said *A B* to pay him the said sum of —/. when he the said *R F* should be thereunto afterwards requested. But the said sum of —/. being wholly unpaid to the said *A B*, and the said promise and undertaking of the said *E F*, being wholly unperformed, he the said *A B* for the recovery of his damages by him sustained, on occasion of the not performing of the said promise and undertaking of the said *E F*, afterwards, to wit, on the day and year aforesaid, sued and prosecuted out of the court of our said lord the king, &c. [*Here state the latitat or bill of Middlesex, and the indorsement for bail, the delivery to the sheriff,† and the arrest, precisely as ante, 162, 163. observing the notes. If the process were by original special capias, testatum, &c. or by capias in the common pleas, observe the precedents, ante, 166, 167. and after stating the arrest, proceed as follows:*] Yet the said *C D* so being sheriff

* 301 * of the said county of — as aforesaid, not regarding the duty of his office as such sheriff, but contriving and intending wrongfully and unjustly to injure the said *A B*, and to delay and hinder him in and from the recovery of his said debt, afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, without the leave or license and against the will of the said *A B*, voluntarily(o) suffered and permitted the said *E F* to escape and go at large wheresoever he would, out of the custody of the said *C D* so being such sheriff as aforesaid, the said debt for which the said *E F* was so arrested as aforesaid, and every part thereof then and still being wholly unpaid to the said *A B*.† And the said

matter of the debt; see a precedent, where the original debt was on bond, 2 Saund. 150. but according to Lutw. 110. Com. Dig. Pleader, 2 P. 1. and E. 18. this is unnecessary; and it is sufficient to state that "*E F* was indebted to the plaintiff in the sum of —/. on a certain cause of action before then accrued to him, and that the said *E F* being so indebted, the plaintiff for the recovery of his said debt, afterwards, to wit, on, &c. aforesaid, sued and prosecuted," &c. and see the precedent, 5 T. R. 127.

1 Wils. 255. Ante, 82. n. (y), and as this latter mode gives the plaintiff more latitude in evidence, it is preferable to the above precedent. In an inferior court it should be stated, that the debt accrued within the jurisdiction, though the omission will be aided after verdict, 5 T. R. 127. 2 Saund. 109. n. 2. 1 Saund. 74. n. 1. Bac. Abr. Escape, A. 1.

(o) Under this allegation, a negligent escape may be given in evidence, 2 T. R. 126. Burr. 2514. 1 Saund. 35. n. 1.

A B in fact saith, that the said *E F* did not appear^(p) in the said court of our said lord the king, before the king himself, at the return of the said writ, (or "*precept*,"") according to the exigency thereof, but therein wholly failed and made default, whereby the said *A B* hath been and is greatly injured and delayed, in the recovery of his aforesaid debt, and is likely to lose the same, and thereby also he the said *A B* hath lost and been deprived of the means of recovering his costs and charges, by him paid, laid out and expended, in and about his said suit, so commenced and prosecuted against the said *E F* as aforesaid, amounting together to a large sum of money, to wit, the sum of —*l.* to wit, at, &c. aforesaid.

For escapes, &c.

[*Same as in the first count to the end of the statement of the delivery of the writ to the sheriff, and then proceed as follows :*]

And the said *A B* in fact saith, that the said *E F* at the time of the delivery of the said last-mentioned writ (or "*precept*") to the said *C D*, so being sheriff of the said county of — as aforesaid, and from thence until the return of the said last-mentioned writ (or "*precept*") was within the said sheriff's bailiwick, and the said sheriff at any time during that period, might have taken and arrested the said *E F* by virtue of the said last-mentioned writ (or "*precept*") at the suit of the said *A B*, if he would so have done, whereof the said *C D* so being sheriff as aforesaid, during all that time had notice, yet the said *C D* so being sheriff of — as aforesaid, not regarding the duty of his said office, but contriving and intending wrongfully and unjustly to injure the said *A B*, and to delay and hinder him in and from the recovery of his debt last aforesaid, did not, nor would, (at any time before the return of the said last-mentioned writ, (or "*precept*,"") although, often requested so to do,) take or cause to be taken, the said *E F* as by the said last-mentioned writ (or "*precept*") he was commanded, but therein wholly failed and made default, and the said *E F* did not appear, &c. [*Same as the first count to the end, and conclude as ante, 238.*]

Second count for not arresting the debtor when the defendant had an opportunity.^(q)

* 302

(p) As to this allegation, Vin. Abr. 487. 501. It is advisable to add this count whenever there is any doubt of the proof of an actual arrest; see *Tit. Esc. p. 4. Noy, 72. Cro. Eliz. 289. 8 T. R. 130.*

(q) See the precedents, 8 Wentw. Left's Rep. 63. 8 Wentw. 487. n. b.

The like and for false return on mesne process of non est inventus. (r)

[*Same as the first count, ante, 299, 300. to the end of the statement of the escape, as far as the obelisk, 30. and then proceed as follows:*] And the said *C D* so being sheriff of —

as aforesaid, afterwards, to wit, on &c. (*the return day*), being the day of the return of the said writ, to wit, at, &c. aforesaid, falsely and deceitfully returned upon the said writ to the court of our said lord the king, before the king himself, here to wit, at *Westminster* aforesaid, that the said *E F* was not found in the bailiwick *of the said *C D*, so being such sheriff as aforesaid, to wit, at, &c. aforesaid, and the said *E F* did not appear, &c. [*As in the first count to the end.*]

* 303

Against the sheriff for an escape on final process.

When it is certain that the caption of the original defendant under a *ca. ex.* can be proved, it is most advisable to declare for the escape in debt, because the jury must then give the entire debt; 2 *T. R.* 129. 1 *Saund.* 38. n. 2. but if it be doubtful whether a caption can be proved, it is advisable to declare in case, stating the escape in one count, as in the precedent, *ante*, 147 to 149. and adding a count for not taking the original defendant when the sheriff had an opportunity, as *ante*, 301. see 1 *Saund.* 38. n. 2. *Bac. Abr.* tit. *Escape, F.*

For a false return of nulla bona, to a writ of fieri facias. (s)

[*Commencement in case as ante, 238. and then state the judgment as ante, 147, 150. to the end of the reference to the record, observing the notes, and then proceed as follows:*] And the said *A B* further saith, that the said judgment being in full force, and the said damages, (or "*debt and damages*,") so recovered as aforesaid, remaining unpaid and unsatisfied, he the said *A B* on, &c. (t) in the — year of the reign of our said lord the king, for the obtaining satisfaction thereof sued and prosecuted out of the said court of our said lord the king, before the king

(r) See the precedent, 2 *Saund.* 150. 155. The statement of the false return may be introduced, as well in the count for an escape, as in the count for not taking; but it seems unnecessary in either case, as the gist of the action is the escape, 2 *Saund.* 155. n. 3.

(s) See *Bac. Abr.* tit. *Sheriff Com. Dig. Return, F. 2.* The precedents, 8 *Wentw.* 453—485. and *Id.* Index, 33. The venue in this action is transitory, 1 *Wils.* 336.

(t) The teste of the writ.

himself, (or if in C. P. "of the Bench aforesaid") at Westminster aforesaid, a certain writ of our said lord the king, called a *fi. fa.*, directed to the sheriff of —, by which said writ our said lord the king commanded the said sheriff(u) that of the goods and chattels of the said *E F in his bailiwick, he should cause to be levied the damages, (or "debt and damages") aforesaid, and that he should have that money before our said lord the king at Westminster aforesaid, on — next after —, (or if by original, "on —, wheresoever," &c.) to render to the said A B for his damages (or "debt and damages") aforesaid, and that the said sheriff should have there then that writ. Which said writ afterwards and before the delivery thereof to the said C D as hereinafter mentioned, was duly indorsed with a direction(x) for the said sheriff to levy —l. besides sheriff's poundage, officer's fees, and all other incidental expenses—and which said writ so indorsed, afterwards and before the said return thereof, to wit, on, &c. at, &c. was delivered to the said C D who then and from thence, until, and at, and after the return of the said writ, was sheriff of the said county of —, to be executed in due form of law.† By virtue of which said writ, the said C D so being sheriff of the said county of — as aforesaid, afterwards and before the said return of the said writ, to wit, on, &c. last aforesaid, at, &c. aforesaid, and within his bailiwick, as such sheriff as aforesaid, seized and took in execution divers goods and chattels of the said E F, of great value, to wit, of the value of the monies so indorsed on the said writ, and directed to be levied as aforesaid, and then and there levied the same thereout. Yet the said C D so being such sheriff of the said county of — as aforesaid, not regarding his duty as such sheriff, but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said A B in that behalf, and to deprive him of the said monies so indorsed on the said writ, and directed to be levied as aforesaid, and of the means of obtaining the same, had not the said

For false returns.

* 304

The levy.

False return

(u) Examine the statement with the writ of *fi. fa.* For the different descriptions of writs, see Tidd's

Practical Forms, Index, tit. *Fieri Facias*.
(x) Examine with the indorsement of the writ.

For false re-
turns.

* 305

monies so levied as aforesaid, or any part thereof, before our said lord the king, (or "*before the justices of the bench*,") at *Westminster* aforesaid, at the return of the said writ, according to *the exigency thereof, and of the said indorsement so made thereon as aforesaid, but therein wholly failed and made default; and at the return of the said writ, to wit, on, &c. aforesaid, falsely and deceitfully returned to the said court of our said lord the king upon the said writ, that(y) the said *E F* had not any goods or chattels in his bailiwick, whereof he could cause to be levied the damages (or "*debt and damages*") aforesaid, or any part thereof, as by the said writ and the return thereof remaining of record in the said court of our said lord the king, before the king himself here, to wit, at *Westminster* aforesaid, fully appears;(z) by means of which said premises, the said *A B* hath been, and is greatly injured and deprived of the means of obtaining the said monies so indorsed on the said writ, and directed to be levied as aforesaid, and which are still wholly unpaid as aforesaid, and is likely to lose the same, to wit, at, &c. aforesaid.

Second count
for not levy-
ing, and false
return of mil-
la bona.(a)

[*The same as the first count to the obelisk, observing the notes, and then proceed as follows:*] And although there were then and afterwards, and before the return of the said last-mentioned writ, divers goods and chattels of the said *E F* within the bailiwick of the said *C D* as such sheriff as aforesaid, whereof the said *C D* could, and might, and ought to have levied the monies so indorsed on the said last-mentioned writ, and directed to be levied as last aforesaid, to wit, at, &c. aforesaid, whereof the said *C D* so being sheriff as aforesaid, there had notice. Yet the said *C D* so being sheriff of the said county of — as aforesaid, not regarding the duty of his office as such sheriff, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said *A B* in this behalf, and to deprive him of the monies so indorsed *on the said last-mentioned writ, and directed to be levied as last afore-

* 306

(y) Examine with the return.

(a) See the use of this count, *ante*.

(z) This reference is unnecessary, 303. and 301.
ante, 182. n. (g).

said, and of the means of obtaining the same, did not, nor would at any time before the return of the said last-mentioned writ levy the monies last aforesaid, or any part thereof, but wholly neglected and refused so to do, and therein failed and made default, and at the return of the said last-mentioned writ, to wit, on, &c. aforesaid, falsely and deceitfully returned to the said court of our said lord the king, that the said *E F* had not any goods or chattels in his bailiwick, whereof he could cause to be levied the damages (or "*debt and damages*") last aforesaid, or any part thereof. As by the said last-mentioned writ and the return thereof remaining, &c. [*Proceed as in the first count to the end.*]

Not taking replevin bond.

[*Commencement as ante*, 238.] For that whereas the said *A B* heretofore, to wit, on, &c. in a certain close, situate, &c. took and distrained divers large quantities of potatoes, then planted and growing in the said close, of great value, to wit, of the value of —*l.* of lawful, &c. as a distress for certain arrears of rent, to wit, for the sum of —*l.* of like lawful money then due and owing from one *E F* to the said *A B* for the rent of the said premises, with the appurtenances, by virtue of a certain demise thereof theretofore made to the said *E F* rendering rent for the same. And the said *A B* then and there detained the said potatoes so taken and distrained for the cause aforesaid, according to the laws and customs of this realm, until the said *C D* then being sheriff of the said county of —, afterwards, to wit, on, &c. aforesaid, and within his bailiwick, as such sheriff, (that is to say,) at, &c. on the complaint of the said *E F*, made to him the said *C D*, so then being such sheriff as aforesaid, against the said *A B* in that behalf, and under colour of his office of such sheriff as aforesaid, caused the

For not taking a replevin bond according to the 11 Geo. II. c. 19. s. 23.(b)

* 307

(b) See the precedents, *Mod. Ent.* 175, 176, 177. The action must be brought in the name of the avowant, or in case there be no avowant, of the person making conscience in the replevin suit, 1 B. & P. 378. The precedents, *ante*, 168 to 173. and the notes thereto, will assist in framing declarations of this nature..
215. 2 Hen. Bl. 36. 547. An action is sustainable against the sheriff, either for not taking replevin bond, *Cro. Car.* 446. *Sir W. Jones*, 378. 1 Saund. 195. b. 2 T. R. 617. or for taking insufficient pledges, 1 Saund. 195. b. 2 Hen. Bl. 36. 547. 4 T. R. 433. 2 Selwyn's Practice, 2d edit.

*Not taking
replevin bond.*

said goods and chattels to be replevied and delivered to the said *E F*, and then and there made deliverance of the said distress to the said *E F*, to wit, at, &c. aforesaid. And the said *A B* in fact further saith, that at the then next county court(c) of the said sheriff, to wit, at the county court of the said sheriff, holden, at, &c. in and for the said county of —, on, &c. before the then suitors of the said court, to wit, —, and —, the said *E F* did appear, and then and there in the same court, without the writ of our said lord the king, levied his plaint against the said *A B* for the taking and unjustly detaining of the said goods and chattels, and afterwards, to wit, on, &c. last aforesaid; at, &c. aforesaid, the said *A B* did duly appear in and before the said court, to answer the said *E F* in the plea of his said plaint, and such proceedings were thereupon had in the said plea, that afterwards, to wit, at the next county court of the said *C D*, as such sheriff as aforesaid, holden at, &c. aforesaid, in and for the said county of —, on, &c. aforesaid, before the said then suitors of the said court, the said *E F* did not duly prosecute his suit, and it was then and there duly considered in and by the said last-mentioned court, that the said *E F* should take nothing by his said plaint, but that he and his said pledges to prosecute should be in mercy, &c. And that the said *A B* should have a return of the said goods and chattels, as by the remembrance and proceedings *thereof still remaining in the said court, more fully and at large appears; and although it was the duty of the said *C D* before his making deliverance of the said distress to the said *E F* as aforesaid, in pursuance of the statute in such case made and provided, to take from the said *E F*, and two responsible persons as sureties, a bond in double the value of the said goods and chattels so distrained as aforesaid, conditioned for the prosecuting the suit of replevin, of the said *E F*, for the taking of the said goods and chattels with effect, and without delay, and for duly returning the goods and chattels so distrained, in case a return

* 308

(c) If the plaint in replevin were above, observe the precedent, *ante*, removed into K. B. or C. P. by *re. fa.* 171 to 172. It is not necessary *12* and there was a declaration and where pledges have been taken, to avowry and judgment in the court state any proceedings against them.

should be awarded. Nevertheless the said *C D* so being such sheriff as aforesaid, not regarding his duty in that behalf, but contriving, and wrongfully and unjustly intending to injure the said *A B*, and to deprive him of the benefit of his said distress, and of the means of obtaining satisfaction for the said arrears of rent so due and owing as aforesaid, did not, nor would, before his making deliverance of the said distress to the said *E F* as aforesaid, take from the said *E F*, and two responsible persons as sureties as aforesaid, such a bond as aforesaid, conditioned as aforesaid, but wrongfully and injuriously wholly omitted and neglected so to do,† to wit, at, &c. aforesaid, and the said *A B*, in fact saith, that he hath not as yet obtained a return of the said goods and chattels so distrained as aforesaid, or any or either of them, or any part thereof, and the said arrears of rent have not, nor hath any part thereof, as yet been paid to him the said *A B*; nor hath he the said *E F* hitherto answered to the said *A B* for the value of the said goods and chattels so distrained as aforesaid, or any or either of them, or any part thereof, and by reason of the premises the said *A B* hath been and is wholly deprived of the said goods and chattels so distrained as aforesaid, and of the benefit of the said distress, and of the means of satisfying the said arrears of rent, and his costs and charges by him expended in and about the endeavouring to obtain satisfaction thereof, and a return of the said goods and chattels, to wit, at, &c. aforesaid, And whereas also heretofore, *to wit, on, &c. aforesaid, at, &c. aforesaid, the said *A B* took and distrained certain other goods and chattels, to wit, &c. of great value, to wit, &c. for a certain sum of money, to wit, &c. then due and owing to the said *A B* for rent, and the said last-mentioned goods and chattels being so distrained as aforesaid, the said *C D* then being sheriff of —, afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, at the prayer of the said *E F*, replevied and made deliverance of the said last-mentioned goods and chattels to the said *E F*, and afterwards, to wit, at the county court of the said *C D*, as such sheriff as aforesaid, duly holden at, &c. aforesaid, on, &c. aforesaid, before certain then suitors of the same court, the said *E F* did not duly appear at the same court, and then and there prosecute with effect his suit by him before then commenced in the same county court against the said *A B* for the

*Not taking
replevin bond.*

* 309

Second count.

†

*Not taking
replevin bond.*

taking of the said goods and chattels as last aforesaid, and it was thereupon then and there duly considered in and by the same court, that the said *A B* should have a return of the said last-mentioned goods and chattels. As by the remembrance and proceedings thereof still remaining in the said court more fully appears. And the said *A B* further saith, that the said *C D*, so being sheriff of, &c. at the time of the causing the said last-mentioned goods and chattels to be replevied and delivered to the said *E F* as aforesaid, not regarding his duty as such sheriff, nor the statute in that case made and provided, but contriving, and wrongfully and unjustly intending to injure, prejudice and aggrieve the said *A B* in that behalf, and to deprive him of the benefit of the said last-mentioned distress, did not, nor would, before the replevying and delivery of the said last-mentioned goods and chattels so distrained as last aforesaid, to the said *E F*, take in the name of the said *C D*, so being sheriff as aforesaid, of the said *E F* and two responsible persons, a bond in double the value of the said last-mentioned goods and chattels so distrained as last aforesaid, such value being ascertained by the oath of one or more credible witness or witnesses not interested in the said last-mentioned goods and chattels, or distress, and conditioned for the prosecuting the suit of replevin of the said *E F* with effect and without delay, and for duly returning the said last-mentioned goods and chattels, in case a return thereof should be awarded before the deliverance of the said last-mentioned distress was so caused to be made to the said *E F* as last aforesaid, as he the said *C D* according to the form of the statute ought to have done; but the said *C D* so being sheriff of, &c. aforesaid, then and there wholly neglected so to do, nor have the said last-mentioned arrears of rent, or any part thereof, been paid or satisfied to the said *A B*, nor hath the said *E F* hitherto answered to the said *A B* for the value of the said last-mentioned goods and chattels so distrained as last aforesaid, or any or either of them, or any part thereof. By means, &c. [*Conclusion as in the first count.*]

[*Proceed as in the precedent, ante, 306. to the obelisk, 308. and then as follows :*] And on the contrary thereof, he the said *C D*, wrongfully and unjustly, before the replevying and delivery of the said cattle, goods and chattels as aforesaid, to wit, on, &c. at, &c. aforesaid, did take in the name of him the said *C D* —, as such sheriff as aforesaid, of the said *E F*, and two other persons, to wit, *G H* and *J K*, a certain bond, conditioned for the prosecuting the said suit of the said *E F*, with effect, and without delay, and for duly returning the said cattle, goods and chattels so distrained as aforesaid, in case a return thereof should be awarded as a bond taken in pursuance of the said statute ; nevertheless the said *A B* in fact saith, that the said *G H* and *J K*, so taken as sureties as aforesaid, at the time of their becoming pledges and sureties in that behalf as aforesaid, were not good, able, sufficient or responsible sureties for prosecuting the said suit with effect and without delay, or for duly returning the said cattle, goods and chattels so distrained as aforesaid, in case a return thereof should be adjudged ; but the said *G H* and *J K*, at the time of their becoming such sureties as aforesaid, were, and each of them was, and ever since hath been, and still are, wholly insufficient for that purpose, nor have the said cattle, goods and chattels, or any or either of them, or any part thereof, as yet been returned to the said *A B*, nor have the said arrears of rent or any part thereof, been as yet paid or satisfied to the said *A B*, nor hath the said judgment been yet in any way satisfied, nor hath the said *E F* hitherto answered to the said *A B* for the value of the said cattle, goods and chattels so distrained as aforesaid, or any or either of them, or any part thereof, by means of which said premises he the said *A B* hath been and is wholly deprived of the said cattle, goods and chattels, and of the benefit of the said distress, and of the means of satisfying the said arrears of rent and the said costs and charges by him in that behalf expended in and about his said suit in that behalf, and in and about the endeavouring to obtain a return of the said cattle, goods and chattels, to wit, at, &c. aforesaid. [*A count may be added for not taking sureties generally.*]

For taking insufficient pledges in replevin. (d)

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(d) See the note, *ante*, 306. n. (b), and 2 Hen. Bl. 36. 547. Mod. Ent. 213.

Against the sheriff for not assigning a bail-bond, on 4 Ann. c. 16. s. 20.(e)

* 312

[*As in the count for an escape, ante, 300. to the end of the statement of the arrest, and then proceed as follows:*] And the said *A B* in fact further saith, that the said *E F* being so arrested and in custody of the said *C D*, so being such sheriff as aforesaid, under and by virtue of the said writ, for the cause aforesaid, he the said *C D*, as such sheriff, afterwards, and before the return of the said last-mentioned *writ, to wit, on, &c. last aforesaid, at, &c. aforesaid, took bail for the appearance of the said *E F* in the said court of our said lord the king, before the king himself, at the return of the said writ, according to the form of the statute in such case made and provided; and on that occasion he the said *C D*, so being such sheriff as aforesaid, then and there, to wit, on, &c. aforesaid, at, &c. aforesaid, took off the said *E F* and two other persons as his sureties or bail, according to the form of the said statute, a certain writing obligatory, commonly called a bail-bond, in the penal sum of —*l.* of lawful money of *Great Britain*, conditioned for the appearance of the said *E F* at the time and place aforesaid, to answer to the said *A B* in the plea and bill aforesaid; and the said *A B* in fact further saith, &c. [*State the non-appearance of the party arrested, and the consequent forfeiture of the bail-bond, (f) as ante, 165. and then proceed as follows:*] And although the said *A B* by *G H* his lawful attorney in that behalf, did(*g*) afterwards, and whilst the said *C D* was such sheriff as aforesaid, to wit, on, &c. at, &c. aforesaid, request the said *C D* to assign the said writing obligatory to him the said *A B*, the plaintiff in the said action, according to the form of the statute in such case made and provided. And although the said *A B* was then and there ready and willing, and then and there offered to pay to the said *C D*, the costs payable to him

(e) Though an action cannot be supported against the sheriff for *not* taking a bail-bond, or for taking insufficient sureties by the plaintiff in the suit, see *Tidd's Practice*, 3d edit. 197. and 2 Saund. 61. f. yet if a bond be taken, the sheriff is, by the 4 Ann. c. 16. s. 20. bound on the request of the plaintiff or his attorney, to assign such bond as therein mentioned, and if he refuse to do so, he is liable to an action on the case, 7 T. R. 122. 2 Saund. 61. a.

(f) This statement does not appear to be absolutely necessary, as the bond may be assigned before it is forfeited, *Tidd's Practice*, 457. and see the words of the statute, 4 Ann. c. 16. s. 20.

(g) See the words of the 4 Ann. c. 16. s. 20.

the said *C D* in that behalf, according to the form of the said last-mentioned statute; yet the said *C D* so being such sheriff as aforesaid, not regarding the duty of his said office as such sheriff, nor the statute in such case made and provided, but contriving, and wrongfully and unjustly intending to injure the said *A B* in this behalf, and to hinder and prevent him from bringing any action or actions on the said writing obligatory, and to deprive him of the means of recovering the damages (or debt) aforesaid, did not, nor would, at the said time when he was so requested as aforesaid, assign the said writing obligatory to him the said *A B*,^(g) but on the contrary thereof, then and there wholly refused, and hath from thence hitherto wholly neglected and refused so to do, and by means of the premises last aforesaid, he the said *A B* hath been and is hindered and prevented from bringing any action or actions on the said writing obligatory, and hath been and is deprived of the means of recovering the said damages, and is likely to lose the same, to wit, at, &c. aforesaid. [*If it be doubtful, whether a bail-bond was taken, add a count for an escape, as ante, 301. See 7 T. R. 109.*]

For not assigning bail-bond.

* 313

Commencement as ante, 238.] For that whereas the said *A B*, before and at the time of the committing of the grievances in this and the three next succeeding counts hereinafter mentioned, was the author and proprietor of the copyright of a certain book, first published within fourteen years last past,^(h) and intitled, &c. [*set forth the title accurately.*] And the said *A B* so being the author of the said book as aforesaid, he the said *A B* before the time of the committing of the grievances hereinafter next mentioned, had printed and published for sale divers, to wit, — copies thereof, to wit, at, &c. Yet the said *C D* contriving, and wrongfully and injuriously intending to injure the said *A B*, and to deprive him of the profits, emolu-

For infringing the copyright of a book. (h)

(g) Or if the assignment were not sufficient, state, "by indorsing the same," &c. as in 4 Ann. c. 16. s. 20. Com. 407. 2 Woodd. Vin. Lec. 392 to 396. See the precedents, 8 Wentw. Index, 32. 1 East, 358. 7 T. R.

(h) See the statute 8 Ann. c. 19. s. 1. 1 East, 358. 7 T. R. 620. 2 Bl.

*Infringing
copyright.*

* 314

Second count,
for exposing
to sale pirated
copies.

ments and advantages which he might and otherwise would have derived and acquired from the sale of the said book, and also to deprive him of the benefit of ^{his} said copyright, heretofore, to wit, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, to wit, at, &c. aforesaid, wrongfully and injuriously *published, exposed to sale, and sold divers*, to wit, — copies of a certain other book, or work, intituled, &c. [*set forth the title,*] which said last-mentioned book or work, had before that time been wrongfully and injuriously copied from the said book of the said *A B* without his consent; by means whereof the said *A B* hath been hindered and prevented from selling divers, to wit, — copies of his said book, and his said copyright therein hath been and is greatly injured and damnified, to wit, at, &c. aforesaid. And whereas also the said *A B*, so being the author and proprietor of the said first mentioned book as aforesaid, yet the said *C D* well knowing the premises, but contriving, and wrongfully and injuriously intending to injure the said *A B*, and to deprive him the said *A B* of the profits, emoluments and advantages which he might and otherwise would have derived and acquired from his said book; and also to deprive him of the benefit of his said copyright therein, heretofore, to wit, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, to wit, at, &c. aforesaid, wrongfully and injuriously *exposed to sale* divers, to wit, — copies of a certain other book or work, intituled, &c. which said last-mentioned book or work, had, before that time, been wrongfully and injuriously copied from the said book of the said *A B*, without his consent, by means whereof he the said *A B* hath been hindered and prevented from selling divers, to wit, — copies of his said book, and his copyright therein hath been and is greatly injured and damnified, to wit, at, &c. aforesaid.

Other counts.

*In the third count, instead of the words in italics, say, "published and exposed to sale, and sold divers," &c. and instead of the words, "which said last-mentioned book or work," &c. say, "great part of which said last-mentioned book or work," &c. The fourth count similar to the third, except that it only states that the defendant, "exposed to sale," &c. The fifth count, "And whereas also the said *A B*, before and at the time of the*

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committing of the grievances in this and the three next succeeding counts mentioned, was the proprietor of the copyright of a certain other book, first published within fourteen years last past, intituled," &c. the same in other respects as the first count. The sixth, seventh and eighth counts similar to the second, third and fourth, stating only that the defendant was the proprietor.

*Infring'g
copyrights*

And whereas also the said *A B*, before and at the time of the committing of the grievances in the four counts hereinafter next mentioned, was lawfully entitled to, and had the sole right of printing certain matters respecting the art of fencing, [or other title or leading subject of that part of the book which was clearly original,] first published within fourteen years now last past, in a certain book of the said *A B*, intituled, &c. and the said *A B* so having the sole right of printing the said matters in the said last-mentioned book, contained as aforesaid, he the said *A B*, before the time of the committing of the grievances hereinafter next mentioned, had printed and published for sale divers, to wit, — copies of the said last-mentioned book, containing the said matters therein, to wit, at, &c. aforesaid. Yet the said *C D*, well knowing the premises, but contriving, and wrongfully and injuriously intending to injure the said *A B*, and to deprive him of the profits, emoluments, and advantages which he might and otherwise would have derived and acquired from the sale of his said last-mentioned book, and also to deprive him of the benefit of his said sole right of printing the said several matters before-mentioned, heretofore, to wit, on, &c. aforesaid, at, &c. aforesaid, wrongfully and injuriously, and without the consent of the said *A B*, transcribed, copied, pirated, and printed the said several matters into and in a certain other book or work, intituled, &c. and on the same day and*year last aforesaid, and on divers other days and times between that day and the day of exhibiting this bill, to wit, at, &c. aforesaid, published, exposed to sale, and sold divers, to wit, — copies of the said last-mentioned book, or work, containing the said several matters so wrongfully and injuriously transcribed, copied, and pirated from the said book of the said *A B*; without his consent, as last aforesaid. By means whereof, he the said *A B* hath been hindered and prevented from selling divers, to wit, — copies of his said book, and his

*Ninth count,
stating that
parts of the
plaintiff's
book were
original*

*Infringing
copyrights.*

said sole right of printing the said several matters, hath been and is, greatly injured and damnified, to wit, at, &c. aforesaid.

Other counts.

The tenth, eleventh and twelfth counts were similar to the above, but varying the statements as in the second, third and fourth counts.

For infringing
the copyright
of a print.⁽ⁱ⁾

And whereas also the said *A B*, after the 24th day of *June*, in the year of our Lord 1777, mentioned in a certain act of parliament made and passed in the parliament of our lord the now king, holden at *Westminster*, in the county of *Middlesex*, in the 17th year of the reign of our said lord the king, intituled, "An act for more effectually securing the property of prints to inventors and engravers, by enabling them to sue for, and recover, penalties in certain cases," to wit, on, &c. and before was, and from thence hitherto hath been, and still is, *the proprietor of certain prints*, which had been theretofore etched in *Great Britain*, that is to say, of a certain print, intituled, ———, and of a certain other print, intituled, ———, and of a certain other print, intituled, ———. And the said *A B*, during all the time aforesaid, had, and was lawfully entitled *to, and still hath and is lawfully entitled to the sole right and liberty of printing and reprinting the said prints, to wit, at, &c. aforesaid. Yet the said *C D*, well knowing the premises, but disregarding the statute in such case made and provided, and contriving, and wrongfully and unjustly intending to injure the said *A B*, so being the proprietor of the said prints as aforesaid, after the said 24th day of *June*, A. D. 1777 aforesaid, and whilst the said *A B* was such proprietor of the said prints as aforesaid, to wit, on, &c. aforesaid, and on divers other days and times between that day and the day of exhibiting this bill, to wit, at, &c. aforesaid, did publish, and cause and procure to be published, divers, to wit, ——— copies of each of the said

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(i) See the statutes, 8 Geo. II. c. to 396. The assignee of a print may 13. s. 1. 7 Geo. III. c. 38. 17 Geo. suc on the last statute, which gives III. c. 57. observed upon in 5 T. R. damages and double costs. As to the 41. 7 T. R. 625. 3 Wils. 60. 2 Bl. declaration, see 5 T. R. 41. Com. 407. 3 Woodd. Vin. Lec. 392

prints, whereof the said *A B* so was the proprietor as aforesaid, without the consent of him the said *A B*, and against his will. By means of the committing of which said last-mentioned grievances, he the said *A B* hath been and is greatly injured in his said property in the said prints, and hath lost and been deprived of divers great gains and profits which he would otherwise have derived and acquired by the printing and selling of the said prints, to wit, at, &c. aforesaid.

Infringing patents.

And whereas also the said *A B*, so being the proprietor of the said prints, &c. aforesaid; yet the said *C D*, well knowing the premises, but contriving, and wrongfully and injuriously intending to injure the said *A B*, so being the proprietor of, &c.—[*Same as the last count from the obelisk to the end, but stating only that the defendant "exposed to sale," &c.*]

Second count

[*Commencement as ante*, 238.]—For that whereas the said *A B*, before and at the time of the making of the letters patent, and of the committing of the grievances by the said *E F*, as hereinafter mentioned, was the true and first inventor of a certain ———, [*describing the invention concisely as in the patent,*] to wit, at, &c. and thereupon our said lord the king heretofore, to wit, on, &c. at, &c. aforesaid, by his letters patent, bearing date at *Westminster* the day and year aforesaid, under the great seal of *England*, and which said letters patent the said *A B* and *C D* now bring here into court, the date whereof is the day and year aforesaid, reciting that, &c. [*here set forth the recital, the grant of the patent, and the condition as to enrolling a specification, and those clauses which prohibit others from exercising it; if the recital be long, it should be omitted.*] As by the said letters patent, reference being thereunto had, will, amongst other things, more fully and at large appear. And the said *A B* and *C D* further say, that the said *A B* did afterwards, to wit, on, &c. at, &c. aforesaid, in pursuance of the said proviso, and of the said letters patent, by an instrument in

For the infringement of patent, by patentee and assignee. (k)

* 320

Enrolment of the specification.

(k) These parties may join, 2 Bull. N. P. 6th edit. 75. Com. Dig. Wils. 423. 2 Saund. 115, 116. a. tit. Patent. 8 T. R. 95. 1 T. R. 602. *Ante*, v. l. c. 1. As to the law relating to patents, see 21 Jac. I. c. 3.

*Infringing
patent.*

Assignment
by *A B* of a
moiety of his
interest to
C D.

* 321

writing under his hand and seal, particularly describe and ascertain the nature of his said invention, and in what manner the same was to be and might be performed, and did afterwards, and within one calendar month next, and immediately after the date of the said letters patent, to wit, on, &c. cause the said instrument in writing to be enrolled in his said majesty's high court of chancery, at *Westminster*, in the county of *Middlesex*. As by the said instrument in writing now remaining of record in the said high court of chancery more fully appears. And the said *A B* and *C D* further say, that the said *A B* afterwards, and before the committing of the several grievances hereafter mentioned, to wit, on, &c. at, &c. aforesaid, by a certain indenture, then and there made between the said *A B* of the one part, and the said *C D* of the other part, which said indenture, sealed with the seals of the said *A B* and *C D* respectively, they, the said *A B* and *C D*, now bring here into court, the date whereof is the day and year last aforesaid, for the considerations therein mentioned, did, *amongst other things, assign, transfer, and set over unto the said *C D* one moiety of, &c. [*state the words of the assignment.*] As by the said indenture, reference being thereunto had, will, amongst other things, more fully and at large appear. And the said *A B* and *C D* further say, that the said *A B* did always, from the time of the making of the said letters patent as aforesaid, until the making of the said indenture, by himself, his deputies, servants, and agents in that behalf, make, use, exercise, and vend his said invention, to wit, at, &c. aforesaid, and that they the said *A B* and *C D* have always, from the time of making the said indenture hitherto, by themselves, their deputies, servants and agents, made, used, exercised, and vended the said invention to their great advantage and profit, to wit, at, &c. aforesaid. Yet the said *E F* well knowing the premises, but contriving, and wrongfully and injuriously intending to injure the said *A B* and *C D*, and to deprive them of the profits, benefits and advantages which they might and otherwise would have derived and acquired from the making, using, exercising and vending of the said invention, after the making of the said letters patent, and of the said indenture, and within the said term of years in the said letters patent mentioned, to wit, on, &c. and on divers other days and times between that

II. FOR TORTS TO PERSONAL PROPERTY.

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day and the day of exhibiting this bill, to wit, on, &c. and within that part of the united kingdom of *Great Britain and Ireland* called *England*, to wit, at, &c. aforesaid, unlawfully and unjustly, without the leave or license, and against the will of the said *A B* and *C D*, or either of them, made and sold divers, to wit, ———, in imitation of the said invention of the said *A B* as aforesaid, in breach of the said letters patent, and against the privilege so granted to the said *A B* and his assigns as aforesaid, whereby the said *A B* and *C D* have been and are greatly injured and deprived of a great part of the profits and advantages which they might otherwise and *would have derived and acquired from the said invention, to wit, at, &c. aforesaid.

*Infringing
patents.*

* 322

And the said *A B* and *C D* further say, that the said *A B* so being such inventor, and the said letters patent having been so made as aforesaid, and the said instrument in writing having been so made and enrolled as aforesaid, and the said indenture having been so made as aforesaid, and the said invention having been so made, used, exercised, and vended by the said *A B* and *C D* as aforesaid, and the said *E F* well knowing the premises, but further contriving and intending as aforesaid, after the making of the said letters patent and of the said indenture, and within the said term of years in the said letters patent mentioned, to wit, on, &c. aforesaid, and on divers other days and times between that day and the day of exhibiting this bill in *England* aforesaid, to wit, at, &c. aforesaid, unlawfully and unjustly, and without the leave or license, and against the will of the said *A B* and *C D*, made divers, to wit, ———, on the said improved plan, and in imitation of the said invention of the said *A B*, in breach of the said letters patent, and against the privilege so granted to the said *A B* and his assigns as aforesaid. Whereby the said *A B* and *C D* have been and are greatly injured, and have lost, and been deprived of divers great gains and profits which they might, and otherwise would have derived and acquired from the said invention, to wit, at &c. aforesaid.

*Second count,
for making
imitations of
the invention.*

The other counts vary from the second only in the insertion of the following words, instead of the word in italics:—3d count, "used and put in practice." ——— 4th count, "did counterfeit"

Other counts

In trover. the said invention, and did use and put in practice."——5th count, "did imitate the said invention, and did use and put in practice."——6th count, "did imitate in part the said invention, and did use and put in practice."——Some of these counts may be omitted, *or others inserted, according to the facts of each particular case.

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Common
count in tro-
ver, for cattle,
deeds, bonds,
bills and
notes, bank
notes, money,
and goods.^(l)

Cattle.

Deeds (m)

Bond.

Bills.

[Commencement as ante, 238.] For that whereas the said *A B* heretofore, to wit, on, &c. at, &c. was lawfully possessed, as of his own property, of certain cattle, deeds, bonds, bills o. exchange, promissory notes, bank notes, securities for money, goods and chattels, to wit, ten horses, ten mares, ten geldings, ten bulls, ten cows, &c. [stating the different description of the cattle,] and a certain indenture of release, bearing date the — day of —, purporting to be made between *E F* of the one part, and *G H* of the other part, and purporting to be a conveyance from the said *E F* to the said *G H* of certain tenements therein mentioned, and a certain other deed, purporting to be a mortgage of certain tenements by the said *E F* to the said *G H*, and of a certain indenture of lease,⁽ⁿ⁾ bearing date, &c. and made between one *J K* of the first part, and one *L M* of the other part, by which said last-mentioned indenture the said *J K* demised to the said *L M* certain tenements therein mentioned, for a certain term therein also mentioned, and yet unexpired, and a certain writing obligatory, commonly called a bond, sealed with the seal of one *N O*, whereby the said *N O* became bound to the said *A B* in the penal sum of 100*l.* and then and still being in full force, and a certain bill of exchange in writing, made and drawn by one *E F*, upon, and accepted by the said *C D*, bearing date the — day of —, whereby the said *E F* requested the said *C D*, two months after the date thereof, to pay to the said *A B*, or his order, the sum of —*l.*

(l) As to the action of trover in general, ante, vol. 1. Index, Trover. 2 Saund. 47. n. Bac. Abr. tit. Trover. Com. Dig. Action on the Case, Trover; and ante, Detinue, 235, 236, 237.

(m) It is not necessary to state the date of the deed, 1 Wils. 116. Bac. Abr. Trover, F. 1.

(n) See the declaration in 3 Woodd. Vin. Lec. 106. n. y.

and a certain other bill of exchange,*accepted by the said *C D* *In trover.*
for the payment by him, the said *C D*, of a certain sum of
money, to wit, the sum of —*l.* at a certain day therein men-
tioned, and now past; and a certain promissory note, in writ- *Notes.*
ting, made and drawn by one *E F*, whereby he the said *E F*
promised to pay to the said *A B* or his order, a certain sum of
money, to wit, the sum of —*l.* at a certain time therein men-
tioned, and now past; and divers, to wit, five notes of the go- *Bank notes.*
vernour and company of the bank of *England*, commonly called
a bank note, for the payment of the sum of *5l.* each; and divers, *Money.*
to wit, twenty pieces of the current coin of this realm, called
guineas, (or *half-guineas, seven-shilling-pieces, crowns, half-*
crowns, shillings," &c.) and divers, to wit, twenty tables, twen- *Goods.*
ty chairs, &c. (*specifying the goods, and avoiding any repetition*
of the same articles, and describing each as generally as possible,
omitting the quality, as "mahogany, silver," &c. See Tidd's
Prac. 3d edit. 560. *Barnes*, 335.) of great value, to wit, of the
value of —*l.* of lawful money of *Great Britain*. And being so *The loss.*
possessed thereof, he, the said *A B*, afterwards, to wit, on the
day and year first above-mentioned, at, &c. aforesaid, casually
lost the said cattle, deeds, bonds, bills of exchange, promissory
notes, bank notes, securities for money, and money, goods and
chattels out of his possession; and the same afterwards, to wit, *The finding.*
on, &c. last aforesaid, at, &c. aforesaid, came to the possession
of the said *C D* by finding. Yet the said *C D*, well knowing *The conver-*
the said cattle, deeds, bonds, bills of exchange, promissory
notes, bank notes, securities for money, money, goods, and
chattels, to be the property of the said *A B*, and of right to be-
long and appertain to him, but contriving, and fraudulently in-
tending, craftily and subtly to deceive and defraud the said
A B in this behalf, hath not as yet delivered the said cattle,
deeds, bonds, bills of exchange, promissory notes, bank notes,
securities for money, money, goods and chattels, or any or
either of them, or any part thereof, to the said *A B*, although
often requested so to do, and hath hitherto wholly refused so
to do, and afterwards, to wit, *on, &c. aforesaid, at, &c. afore-
said, converted, and disposed of the said cattle, deeds, bonds,
bills of exchange, promissory notes, bank notes, securities for
money, money, goods and chattels, to his own use. To the
damage, &c. [*Conclude as ante*, 238.]

In trover.

By assignees
of a bankrupt.
First count on
bankrupt's
possession.

[*Commencement as ante, 51.*] For that whereas the said *E F*, before he became a bankrupt, to wit, on, &c. at, &c. was lawfully possessed of, &c. [*state the property as in the last precedent,*] of great value, to wit, of the value of —*l.* and being so possessed thereof, he, the said *E F*, afterwards, and before he became a bankrupt, to wit, on, &c. aforesaid, casually lost the said goods and chattels out of his possession, and the same, afterwards, and before the said *E F* became a bankrupt, to wit, on, &c. aforesaid, there came to the possession of the said *C D* by finding. Yet the said *C D*, well knowing the said goods and chattels to be the property of the said *E F*, before he became a bankrupt, and of right to belong and appertain to the said *A B*, as assignee as aforesaid, after the said bankruptcy; but contriving, and fraudulently intending to injure the said *E F*, before he became a bankrupt, and the said *A B*, as assignee as aforesaid, since the said bankruptcy in this behalf, hath not, although often requested so to do, as yet delivered to them, or either of them, the said goods and chattels, or any or either of them, or any part thereof, but hath hitherto wholly neglected and refused so to do, and afterwards, and since the said bankruptcy, to wit, on, &c. converted, and disposed thereof to his own use, to wit, at, &c. aforesaid.

Second count
on the as-
signee's pos-
session.

And whereas also the said *A B*, as such assignee as aforesaid, after the said *E F* became a bankrupt, to wit, on, &c. at, &c. aforesaid, was lawfully possessed of certain other goods and chattels, to wit, &c. [*describe the property as ante, 323, 324.*] of great value, to wit, of the value of —*l.* as of the property of the said *A B*, as such assignee as aforesaid, and being so possessed *thereof, he the said *A B*, afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, casually lost the said last-mentioned goods and chattels out of his possession, and the same afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, came to the possession of the said *C D* by finding. Yet the said *C D*, well knowing the said last-mentioned goods and chattels to be the property of the said *A B*, and of right to belong and appertain to him as such assignee as aforesaid, but contriving, and fraudulently intending to injure the said *A B*, as such assignee as aforesaid, in this behalf, hath not, although often requested so to do, delivered the said goods and chattels, or any or either

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of them, or any part thereof, to the said *A B*, but hath hitherto wholly neglected and refused so to do, and afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, converted and disposed thereof to his own use, &c. To the damage of the said *A B*, as such assignee as aforesaid, of —*l.* and therefore he brings his suit, &c.

In trover.

[*Commencement as ante*, 55.] For that whereas the said *E F* in his life-time, to wit, on, &c. at, &c. was lawfully possessed of divers goods and chattels, to wit, &c. [*describe the property as ante*, 323, 324.] of great value, to wit, of the value of —*l.* of lawful, &c. as of his own property, and being so possessed thereof, he the said *E F*, in his life-time, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, casually lost the said goods and chattels out of his possession, and the same afterwards, and in the life-time of the said *E F*, to wit, on, &c. at, &c. aforesaid, came to the possession of the said *C D* by finding. Yet the said *C D*, well knowing the said goods and chattels to be the property of the said *E F* in his life-time, and of right to belong and appertain to him the said *E F* in his life-time, and to the said *A B* as executor as aforesaid, after the decease of the said *E F*, but contriving, and fraudulently intending craftily and subtly to deceive and defraud the said *E F* in his life-time, and the said *A B*, as executor as aforesaid, since the death of the said *E F*, in this behalf, did not deliver the said goods and chattels, or any of them, or any part thereof, to the said *E F* in his life-time, nor hath he as yet delivered the same, or any of them, or any part thereof, to the said *A B*, executor as aforesaid, since the death of the said *E F*, (although often requested so to do,)[†] and he the said *C D* afterwards, and in the life-time of the said *E F*, to wit, on, &c. aforesaid, at, &c. aforesaid, converted and disposed of the said goods and chattels to his own use.

By an executor for a trover and conversion in the lifetime of the testator.^(o)

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(o) As to the counts in trover, on the possession of the testator, and of the plaintiff as executor, and his liability to costs on the latter count, see *Hullock's Law of Costs*, 184 to 187. 4 T. R. 277. 2 B. & P. 253. 3 B. & P. 115. *Tidd's Prac.* 893. It is in general sufficient to insert in the declaration the above count and the next but one; see 2 *Saund.* 47. k.

In trover.

Second count on a trover in lifetime of testator, and conversion after his death.

[*When the trover was in the life-time of the testator, but the conversion after his death, the count runs as above to the statement of the conversion, at the obelisk, and then as follows:*]
 "And the said *C D* afterwards, and after the death of the said *E F*, to wit, on, &c. at, &c. aforesaid, converted and disposed of the said goods and chattels to his own use."

Third count, for trover, and conversion after testator's death. (*p*)

And whereas also the said *A B*, as executor as aforesaid, afterwards, and after the death of the said *E F*, to wit, on, &c. at, &c. was lawfully possessed of divers other goods and chattels, to wit, &c. [*describe the property as ante, 323, 324.*] of great value, to wit, of the value of —*l.* of lawful, &c. as of his property as such executor as aforesaid, and being so possessed thereof, he the said *A B*, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, casually lost the said last-mentioned goods and chattels out of his possession, and the same then and *there came to the possession of the said *C D* by finding. Yet the said *C D*, well knowing the said last-mentioned goods and chattels to be the property of the said *A B* as such executor as aforesaid, and of right to belong and appertain to the said *A B* as such executor, but contriving, and fraudulently intending to deceive and defraud the said *A B*, as such executor as aforesaid, in this behalf, hath not as yet delivered the said last-mentioned goods and chattels, or any part thereof, to him the said *A B*, although often requested so to do,) and hath hitherto wholly neglected and refused, and still wholly neglects and refuses so to do, and afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, converted and disposed of the said last-mentioned goods and chattels to his own use. [*Conclude, to the damage of the plaintiff, "as executor," and with the profit, as ante, 56.*]

* 328

(*p*) The property of the goods draws to it a possession in law, therefore an executor may declare on his own possession "*as executor*," though in fact he never has had possession; 2 Saund. 47. k. See the note, *ante*, 326. n. (*e*). As to this count in general, 2 Saund. 47. k. The executor must, in support of this count upon the trial, prove himself to be executor, by producing the probate, *id. ibid.*

[Commencement *as ante*, 64, 65, 66, 67.] For that whereas the said *E F*, in his life-time, to wit, on, &c. at, &c. was lawfully possessed, as of his own property, of divers goods and chattels, to wit, &c. of great value, [*describe the property, as ante*, 323, 324.] to wit, of the value of —*l.* and being so possessed, he the said *E F*, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, casually lost the said goods and chattels out of his possession, and the same afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, came to the possession of the said *C D* by finding. Yet the said *C D*, well knowing the said goods and chattels to be the property of the said *E F* in his lifetime, and at the time of his death, and after his decease, of right to belong to the said *A B* as administrator aforesaid, (to which said *A B*,† after the death of the said *E F*, to wit, on, &c. at, &c. aforesaid, administration of all and singular the goods, chattels, and credits, which were of the said *E F*, deceased, at the time of his death, who died intestate, by *Charles*, by divine providence, archbishop of *Canterbury*, primate of all *England* and metropolitan, in due form of law was granted,) but contriving and fraudulently intending craftily and subtly to deceive and defraud the said *E F* deceased, in his life-time, and the said *A B* as administrator as aforesaid, since the death of the said *E F* in this behalf, did not deliver the said goods and chattels, or any of them, or any part thereof, to the said *E F* in his life-time, nor hath he as yet delivered the same, or any of them, or any part thereof, to the said *A B* administrator as aforesaid, since the death of the said *E F*, although often requested so to do.† And the said *C D*, afterwards, and in the life-time of the said *E F*, to wit, on, &c. aforesaid, at, &c. aforesaid, converted and disposed of the said goods and chattels to his own use.

In trover.

By an administrator. First count on intestate's possession. (q)

* 329

[When the trover was in the life-time of the intestate, but the conversion after his death, the count runs as above, to the statement of the conversion, at the obelisk, and then as follows :] And the said *C D*, afterwards, and after the death of the said

Second count, on a trover in the life-time of intestate, and conversion after his death.

(q) As to the counts on the intestate's, and the administrator's possession, and the costs, *ante*, 326. n. (o).
29 *Saund.* 138. n. 2. By *baron and feme*, executrix or administratrix; 1 *Salk.* 114. 1 *Lill. Ent.* 70. *Bac. Abr. De.* *tinue*, A.

In trover. *E F*, to wit, on, &c. aforesaid, at, &c. aforesaid, converted and disposed of the said goods and chattels to his own use.

Third count,
on a trover after
the intestate's death,
and before
grant of ad-
ministration.

And whereas also the said *E F* in his life-time, to wit, on, &c. aforesaid, at, &c. aforesaid, was lawfully possessed of divers other goods and chattels, to wit, &c. [*describe the property as ante*, 323, 324.] of great value, to wit, &c. as of his own property, and being so possessed thereof, he the said *E F*, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, died so possessed thereof, after whose death, to wit, on, &c. last aforesaid, at, &c. aforesaid, the said goods and chattels came to the possession of the said *C D* by finding. And afterwards, to wit, on, &c. at, &c. administration was granted to the said *A B* as aforesaid, [*or if this be the first count, state the administration fully, as ante*, 328.] Yet the said *C D* well knowing *the said goods and chattels to be the property of the said *E F* in his life-time, and at the time of his death, and to belong to the said *A B* as administrator as aforesaid, after the death of the said *E F*, but contriving, &c. to defraud the said *A B* as administrator as aforesaid, in this behalf, hath not as yet, &c.

* 330

Fourth count,
on possession
of the admini-
strator, and
conversion af-
ter the death.

[*This count is similar to that at the suit of an executor, ante*, 327. inserting the word "administrator," instead of "executor," and as the general property of the goods draws to it a possession in law, this count may be supported, though the administrator may never have had actual possession, 2 Saund. 47, k. *Ante*, 327. n. (p).]

For an injury
to plaintiff's
reversionary
interest in
goods in pos-
session of a te-
nant.(r)

[*Commencement as ante*, 238.] For that whereas *A B* be-
fore and at the time of the committing of the grievance here-

(r) The general property in goods draws to it a possession in law sufficient to enable the owner to maintain trespass or trover, unless the right of possession be in a third person at the time of the injury complained of; 2 Saund 47. n. But if the right of possession be in such third person, the general owner, whose reversionary interest has been prejudiced, cannot support trespass or trover, but

must declare specially as above, 4 T. R. 459. 7 T. R. 9. However, in the case of trees cut down and taken away by a stranger, pending a lease, as the interest of the lessee remains no longer than whilst the trees are growing upon the premises, the landlord may support trespass or trover, 7 T. R. 13. Vin. Abr. Trespass, S. pl. 10. 4 Leon. 102. 1 Saund. 322. n. 5.

inafter next mentioned, was the owner and proprietor of divers *In reversion.* goods and chattels, to wit, &c. of great value, to wit, of the value of —/— and which said goods and chattels had been and were before then let to hire to one *E F*, for a certain term then to come and unexpired, and the same were then in the possession of the said *E F*, under and by virtue of the said letting, to wit, at, &c. Yet the said *C D*, well knowing the premises, but contriving, and wrongfully and unjustly intending to injure, prejudice and aggrieve the said *A B* in his reversionary interest and property in the said goods and chattels, and to deprive him of *the benefit and advantage thereof whilst the said *A B* so was the owner and proprietor of the said goods and chattels, and whilst the same were so let to and in the possession of the said *E F* as aforesaid, to wit, on, &c. at, &c. aforesaid, wrongfully and unjustly seized and took the said goods and chattels of the said *A B*, from and out of the possession of the said *E F*, and converted and absolutely sold and disposed thereof to his own use. [*Add a count in trover, and conclude as ante, 238.*]

* 331

III. FOR TORTS TO REAL PROPERTY CORPOREAL.

[*Commencement as ante, 238. The venue is local, ante, vol. For obstructing ancient windows.(s)*
1. *Index, Venue.*] For that whereas the said *A B* before and

(s) See the precedents of declarations, for different nuisances to houses in possession, 8 Wentw. Index, 62. 3 Ld. Raym. 259. Lill. Ent. 81, 82. Mod. Ent. 143. 146. for erecting a smith's shop, 1 Lutw. 69. for undermining a house, 2 Hen. Bl. 267. 2 Saund. 397. for obstructing an entrance to a house, 4 T. R. 794. As to the law, see Com. Dig. Action Case for a Nuisance. Injury to prospect is no ground of action, 9 Co. 58. The person in actual possession, whether lawfully or not, may support this action against a wrongdoer, 1 East, 244. 1 Show. 7. n. a. A landlord may also sue for an injury during the tenancy, Com. Dig. Action Case Nuisance, B. but the form of the declaration will in such case be different, see the precedents, *post*, 336. and 8 Wentw. 548. The action may be either against the party who made or continued the nuisance, Com. Dig. Action Nuisance, B. 1 B. & P. 404. and generally against the occupier of the adjoining premises, 4 T. R. 318. 2 Hen. Bl. 350. Or it may be against the lessor for a nuisance erected by him, and continued by his tenant, 3 Salk. 460. 12 Mod. 636.

To houses or
land in pos-
session.

* 332

at the time of the committing of the grievance hereinafter next mentioned, was and from thence hitherto hath been, and still is, lawfully possessed^(t) of a certain messuage or dwelling-house, with the appurtenances, situate *and being at, &c.^(u) in which said messuage or dwelling-house, during all the time aforesaid, there were, and still of right ought to be,^(x) divers, to wit, two ancient^(y) windows through which the light and air, during all the time aforesaid, ought to have entered, and still of right ought to enter, into the said messuage or dwelling-house, for the convenient and wholesome use, occupation and enjoyment thereof. Yet the said *C D*, well knowing the premises, but contriving, and wrongfully and unjustly intending, to injure the said *A B* and to deprive him of the use, benefit and enjoyment of the said windows, and to annoy and incommode him in the use, possession and enjoyment of the said messuage or dwelling-house, with the appurtenances, heretofore, to wit, on, &c.^(z) wrongfully and injuriously† erected and raised, and caused and procured to be erected and raised, a certain wall, and building,^(a) near to the said windows, and wrongfully and injuriously kept and continued the said wall and build-

(*t*) Possession in fact is sufficient, 1 East, 204. 1 Show. 7. n. a. and the term "lawful" is unnecessary, 5 East, 276. and it is improper to declare on a scisin in fee, or otherwise to state the plaintiff's title, 2 Saund. 113. a. n. 1. Com. Dig. Pleader, C. 39. and ante, vol. 1. Index, tit. Title and Declaration. If a title be stated and it appear to be insufficient, the declaration will be demurrable, 2 Ld. Raym. 1223. Salk. 365. and it must be proved as stated, 2 Saund. 206. a. n. 22. 207. a. n. 24.

(*u*) The venue is local, Com. Dig. Action, N. but it is not necessary to give a local description of the nuisance, 2 East, 497.

(*x*) This is a sufficient statement of the right, 1 Show. 7. 2 Saund. 113. b.

(*y*) It is usual to insert the word "ancient," but it is unnecessary,

Com. Dig. Action Nuisance, E. 1. 1 Show. 7. Lill. Ent. 81, 82. 2 Saund. 113. b. 114. Twenty years uninterrupted use of the windows is sufficient, 3 T. R. 159. 6 East, 215. 4 Esp. Rep. 70, 71. 2 Saund. 175. n. 2. (*z*) The day is not material, Cro. Eliz. 191. 1 Saund. 24. a.

(*a*) It is not necessary to allege that the building was on a new foundation; though in London a person may build upon an ancient foundation against the lights of another, Yelv. 215, 216. 1 Roll. 558. 1 Burr. 248. 9 Co. 58. b. If the mode in which the injury was committed be doubtful, add a count generally for obstructing the light, without stating the means, and which will be sufficient, 3 Leon. 13. Cro. Jac. 606. Willes, 577. 1 B. & P. 160. Ld. Raym. 452.

III. FOR TORTS TO R. PROPERTY CORPOREAL.

*333

ing *so erected and made, for a long space of time, to wit, from the day and year aforesaid, hitherto. (b) By means of which said premises the said messuage or dwelling-house, with the appurtenances, during all the time aforesaid, was, and still is, greatly darkened, and the light and air were and are hindered and prevented from coming and entering into and through the said windows, into the said messuage or dwelling-house, and the same hath thereby been rendered and is close, uncomfortable, unwholesome, and unfit for habitation, and the said *A B* hath thereby been, and still is, greatly annoyed and incommoded in the use, possession, and enjoyment of his said messuage or dwelling-house, with the appurtenances. And also by means of the premises, he the said *A B* hath been forced and obliged, for the obtaining light in his said messuage or dwelling-house, to lay out and expend a large sum of money, to wit, the sum of —*l.* in and about the making of a skylight therein, to wit, at, &c. aforesaid.

To houses of land in possession.

[Second count same as the first, to the obelisk, and then proceeded as follows:—] “kept and continued, and caused to be kept and continued, a certain wall and building, before then wrongfully erected and raised by him the said *C D*, near to the said windows, for a long space of time, to *wit, hitherto. By means, &c. [Conclude as in the first count.]

Second count for continuing the nuisance. (c)

* 334

[Commencement as ante, 238. The venue is local.] For that whereas the said *A B*, before and at the time of the commit-

For not repairing a privy adjoining plaintiff's house (d)

(b) In some cases this *adhuc existit* would be improper; 1 Show. 366. 3 Lev. 345. and in a declaration in the common pleas, it seems more correct here to insert a particular day, but in K. B. by bill, the *adhuc existit* is always proper, as the writ may be issued before the cause of action accrues, 4 East, 75. 7 T. R. 4. but in all cases it is improper to declare for damages which can only have accrued after the time of declaring, 2 Saund. 169 to 171.

(c) In a declaration for the continuing of a nuisance, it is not neces-

ry to shew the time when the nuisance was erected, Cro. Eliz. 191. As to this count in general, see Ld. Raym. 370. 1 Salk. 10. Carth. 455. If the action is not brought against the original creator of the nuisance, but against his feoffee, lessee, &c. it is necessary to allege a special request to the defendant to remove the nuisance, Willes, 583. Cro. Jac. 555. 5 Co. 100, 101. Jenkins, 260.

(d) See the last precedent, and the notes, and the precedents, 3 Ld. Raym. 324. Morg. Prec. 333.

*To houses or
land in pos-
session.*

ting the grievances hereinafter mentioned, was and from thence hitherto hath been, and still is, lawfully possessed^(e) of a certain dwelling-house, with the appurtenances, situate and being at, &c. and in which said dwelling-house, with the appurtenances, he the said *A B* and his family, at the times hereinafter mentioned, inhabited and dwelt, and still do inhabit and dwell, to wit, at, &c. aforesaid. And whereas also the said *C D*, before and at the time of the committing of the grievances hereinafter next mentioned, was and from thence hitherto hath been and still is, possessed of a certain other dwelling-house, with the appurtenances, and of a certain privy near to the said dwelling-house of the said *A B*, to wit, at, &c. aforesaid. And by reason of the possession of his said dwelling-house and privy, with the appurtenances, during all the time hereinafter next mentioned, the said *C D* ought to have repaired, and still of right ought to repair,^(f) a certain wall adjoining the said privy, and near to the said premises of the said *A B*, as often as need or occasion hath been or required, or should be or require, to wit, at, &c. aforesaid. Nevertheless the said *C D*, well knowing the premises, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said *A B*, and to incommode and annoy him and his family in the possession, use, occupation, and enjoyment of his said dwelling-house, with the appurtenances, heretofore, to wit, on, &c. and from thence for a long space of time, to *wit, hitherto, at, &c. aforesaid, wrongfully and unjustly suffered and permitted the said wall to be and continue, and the same during all that time was, and still is, out of repair for want of needful and necessary reparation thereof, and by means thereof, on divers days and times, during that time, divers large quantities of excrement and filth penetrated, issued, and flowed from and out of the said privy, through the said wall, unto and into the said premises of the said *A B*, and stayed, continued, and remained therein, during all the time aforesaid. And also thereby divers noisome, noxious, offensive, and unwholesome smells,

* 335

(e) This is sufficient, *ante*, 331. *parare* is sufficient, 1 Salk. 360. 2 n. (i). Ld. Raym. 1092. 3 T. R. 766. 2
(f) This allegation of *decurt* re- Saund. 114. a. b. c.

vapours, and stench. during the time aforesaid, ascended and came unto and into the said premises of the said *A B*, and on those several days and times there greatly annoyed and incommoded the said *A B* and his family in their said habitation of the said dwelling-house of the said *A B*, and also by means of the premises, he the said *A B* hath been and is hindered and prevented from exercising and carrying on his trade and business of a ——— in so beneficial a manner as he before the committing of the said grievances by the said *C D* had been used and accustomed to do, and would have continued to do, and hath thereby been deprived of divers great gains and profits which he otherwise might and would have derived and acquired, to wit, at, &c. aforesaid.

To houses or land in possession.

And whereas also the said *A B*, being so possessed of his said dwelling-house, with the appurtenances as aforesaid, the said *C D*, before and at the time of the committing of the grievance hereinafter mentioned, was possessed of a certain privy and cesspool, near to the said dwelling-house, with the appurtenances, of the said *A B*, and by reason thereof, he the said *C D*, before and at the time of the said *C D*'s committing the grievance hereinafter mentioned, ought to have hindered and prevented the excrement, filth and water, from time to time being in the said privy and cesspool, from running and proceeding therefrom, unto and into the said dwelling-house, with the appurtenances, *of the said *A B*, to wit, at, &c. aforesaid. Nevertheless the said *C D*, well knowing the said last-mentioned premises, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said *A B*, and to incommode and annoy him and his family in the possession, use, occupation, and enjoyment of his said dwelling-house, with the appurtenances, heretofore, to wit, on, &c. and on divers other days and times, between that day and the day of exhibiting this bill, to wit, at, &c. aforesaid, wrongfully and unjustly suffered and permitted divers large quantities of excrement, filth, and water, to penetrate, issue, and flow from and out of the said last-mentioned privy and cesspool, unto and into the said premises of the said *A B*, and to stay, continue, and remain therein during all the time last aforesaid, and also thereby, &c.
[Same as the first count, from the obelisk to the end.]

Second count, for not emptying the cesspool.

* 336.

To houses or
land in pos-
session.

By a rever-
sioner for da-
mage done to
a messuage in
the possession
of his tenant.
(g)

* 337

[Commencement as ante, 238. The venue is local.] For that whereas before and at the time of the committing of the griev-
ances by the said *C D* as hereinafter mentioned, a certain mes-
suage or dwelling-house, with the appurtenances, situate at, &c.
was in the possession and occupation of one *E F*, as tenant
thereof to the said *A B*, (the reversion thereof then and still
belonging to the said *A B*), to wit, at, &c. aforesaid. Yet the
said *C D*, well knowing the premises, but contriving and wrong-
fully and unjustly intending to injure, prejudice, and aggrieve
the said *A B* in his reversionary estate and interest of and in
the said messuage or dwelling-house, with the appurtenances,
*whilst the said messuage or dwelling-house, was so in the
possession and occupation of the said *E F* as tenant thereof
to the said *A B*, and whilst he the said *A B* was so interested
therein as aforesaid, to wit, on, &c. and on divers other days and
times, between that day and the day of exhibiting this bill, at,
&c. aforesaid, wrongfully and unjustly, without the leave or li-
cense, and against the will of the said *A B*. [Here state the
nuisance or subject matter of complaint.] By means of which
said several premises he the said *A B* hath been and is great-
ly injured, prejudiced and aggrieved in his reversionary estate
and interest of and in the said messuage or dwelling-house,
with the appurtenances, so in the possession and occupation of
the said *E F* as tenant thereof to the said *A B* as aforesaid, to
wit, at, &c. aforesaid.

For diverting
the water of a
river from
plaintiff's mill.
(h)

[Commencement as ante, 238.] For that whereas the said
A B before and at the time of the committing of the griev-
ances by the said *C D* hereinafter next mentioned, was and
from thence hitherto hath been, and still is, lawfully possess-

(g) See the precedents, 8 Wentw. Index, 61 to 65. Plead. Ass. 77. 3 Wils. 361. That reversioner may sue, see Com. Dig. Action Case, Nuisance, B. 3 Lev. 360. 4 Burr. 2141. The statement of the reversionary interest is merely inducement, and though a seisin in fee, &c. is often stated in a declaration by a reversion; see 3 Wils. 461. yet in order to avoid the

necessity of proving the precise estate as alleged, it may be advisable to adopt the above form, which will suffice; 2 Saund. 133. b. 252. d. Com. Dig. Pleader, C. 39.

(h) See the precedents, 8 Wentw. Index, 65. 2 East, 497. 4 East, 107. 6 East, 208. and the notes to the precedents, ante, 331. most of which are applicable.

ed(i) of certain iron and tin works, with the appurtenances, *To water-course.* situate, and being at, (k) &c. and by reason thereof before and at the time of the committing of the grievances hereinafter mentioned, of right(l) ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of a certain stream or water-course in the county aforesaid, which during all that time of right ought to have run and flowed, (m) *and until the diversion thereof hereinafter mentioned, of right had run and flowed, and still of right ought to run and flow unto the said works of the said *AB* for the supplying of the same with water for the working thereof, to wit, at, &c. aforesaid. Yet the said *CD* well knowing the premises, but contriving, and wrongfully and unjustly intending to injure and prejudice the said *AB* in this respect, and to deprive him of the use, benefit and advantage of the water of the said stream, and to hinder and prevent him the said *AB* from working his said iron and tin works in so ample and beneficial a manner as he had theretofore done, and of right ought to have done, and to injure him in the way of his trade and business of a manufacturer of tin plates, which he during all the time aforesaid, exercised and carried on, and still doth exercise and carry on, at the said works, and to put him to great charge, expense trouble and inconvenience; whilst he the said *AB* was so possessed of the said iron and tin works, with the appurtenances as aforesaid, and so exercised and carried on his said trade and business therein, to wit, on, &c. and on divers other days and times, between that time and the day of exhibiting the bill of the said *AB* against the said *CD* in this behalf, wrongfully and injuriously cut, dug and made, and caused to be cut, dug and made, in and out of the sides of the said stream or water-course above the said works, divers, to wit, — sluices, — trenches, — channels, and — cuts, of great depth and width, to wit, of the width of — feet, and of the depth of

* 338

(i) The statement of possession is sufficient, *ante*, 331.

(k) The venue is local, but a local description of the nuisance is unnecessary, 2 East, 477.

(l) *Ante*, 332. and 6 East, 208.

(m) It is not necessary to shew any

other title in a declaration for the diversion of a water-course than "*que ad terram*," &c. of plaintiff "*currere consuevit*," 2 Saund. 114. *Ante*, 332. Cro. Car. 500. 575. 3 Lev. 139. 3 Mod. 49. Show. 64. Carth. 85.

*To water-
courses.*

* 339

— feet, and kept and continued, and caused to be kept and continued, the said sluices, trenches, channels and cuts, on the sides of the said stream or water-course, for a long space of time, to wit, from thence hitherto, and thereby during all the time aforesaid, unlawfully and wrongfully diverted and turned divers large quantities *of the water of the said stream or water-course out of and away from the said iron and tin works of the said *A B*, and stopt, prevented and hindered, the water of the said stream or water-course from running or flowing along its usual course to the said works, and from supplying the same with water for the necessary working thereof, as the same of right ought to have done, and otherwise would have done, and by reason thereof the water of the said stream or water-course, sufficient for the supplying of the said works of the said *A B*, during all or any part of that time, could not, nor did run or flow to the same, as the same of right ought to have done, and otherwise would have done, and the said *A B* thereby for want of such sufficient water, could not, during that time, use his said iron and tin works, or follow, use or exercise his said trade or business therein in so large, extensive and beneficial a manner as he might and otherwise would have done, but was thereby during all that time deprived of the use and enjoyment of his said works, and of all the benefits, profits, gains and advantages, which he otherwise might and would have made, by carrying on his trade and business therein, to wit, at,

Second count,
stating a ge-
neral diver-
sion of the wa-
ter, without
shewing the
means.

&c. aforesaid. And whereas, also the said *A B* before and at the time of the committing of the grievance hereinafter next mentioned, was and from thence hitherto hath been, and still is, lawfully possessed of certain other iron and tin works, with the appurtenances, situate and being at, &c. aforesaid, near to a certain other stream or water-course there, and which said last-mentioned stream or water-course before and at the time of the committing of the grievances hereinafter next mentioned, had run and flowed and been used and accustomed to run and flow, and of right ought to have run and flowed, and still of right ought to run and flow in great plenty and abundance, unto the said last-mentioned works of the said *A B* for the supplying of the same with necessary water for the working thereof, to wit, at, &c. aforesaid. Yet the said *C D* well knowing the said last-mentioned premises, but *contriving, and intending to injure and prejudice the said *A B* in this behalf, and to deprive

* 340

him of the use, benefit and advantage of the water of the said last-mentioned stream or water-course, and to deprive him of the benefit and profits of his said last-mentioned works, and of his trade and business as manufacturer of tin plates as aforesaid, and to put him to great charge, trouble, expense and inconvenience, whilst he the said *A B* was so possessed of the said last-mentioned works, with the appurtenances as aforesaid, and carried on his said business therein, to wit, on, &c. and on divers other days and times, between that day and the day of exhibiting this bill, wrongfully and unjustly diverted and turned divers large quantities of the water of the said last-mentioned stream or water-course out of the same, and away from the said last-mentioned iron and tin works of the said *A B*, and hindered and prevented the water of the said last-mentioned stream or water-course from running or flowing along its usual course to the said last-mentioned works of the said *A B*, and from supplying the same with water for the necessary working thereof, as the same ought to have done and otherwise would have done, and by reason thereof the water of the said last-mentioned stream or water-course, sufficient for the supplying of the said last-mentioned works, during that time, could not, nor did run or flow to the same as the same ought to have done, and otherwise would have done, and the said *A B* for want of such sufficient water, could not during that time use his said last-mentioned works, or follow, use or exercise, his trade and business therein, in so large, extensive and beneficial a manner as he ought to have done, and otherwise would have done, but was thereby during all that time, deprived of the use and enjoyment of the said last-mentioned works, and of all benefit, profit, gain and advantage, which he otherwise might and would have made, by carrying on his said trade and business therein, to wit, at, &c. aforesaid. And whereas also the said *A B* before and at the time of the committing of the grievances hereinafter next mentioned, was and from thence hitherto hath been, and still is, lawfully possessed of certain other — works, with the appurtenances, situate and being at, &c. aforesaid, near to a cer-

To water-course.

Third count, for not keeping the banks of the river in repair (n)

* 341

(n) This count is proper, in order to avoid the risk of not being able to prove that the defendant made the cuts, as stated in the first count.

*To water-
courses.*

tain other stream or water-course there, and which said last-mentioned stream or water-course, before and until the time of committing the grievances hereinafter mentioned, had run and flowed, and had been used and accustomed to run and flow, and of right ought to have run and flowed, and still of right ought to run and flow, in great plenty and abundance, unto the said last-mentioned works of the said *A B*, for the supplying of the same with necessary water for the working thereof, to wit, at, &c. aforesaid. And whereas the said *C D*, before and at the time of the committing of the same grievance hereinafter mentioned, was and from thence hitherto hath been, and still is, possessed of divers, to wit, — closes of land, on the banks and sides of the said last-mentioned stream or water-course, and the said *C D*, by reason thereof, during all the time aforesaid, of right ought to have repaired and amended, and still of right ought to repair(o) and amend such part of the banks of the said stream or water-course, which are situate within and parts of the same closes as occasion hath required, or should require, to prevent the water of the said last-mentioned stream or water-course from escaping or running from the same, through the said banks, through the defects and insufficiencies thereof. Yet the said *C D*, well knowing the said last-mentioned premises, but contriving and intending wrongfully and unjustly to injure, prejudice, and aggrieve the said *A B* in this behalf, and to deprive him of the use, benefit, and advantage of the water of, the said last-mentioned stream or water-course, and of the benefits and profits arising from *his exercising and carrying on his said trade and business in the said last-mentioned works as aforesaid, whilst he the said *A B* was so possessed of the said last-mentioned works, with the appurtenances as aforesaid, and carried on his said trade and business therein, to wit, on, &c. and from thence for a long space of time, to wit, hitherto wrongfully and unjustly suffered and permitted the said banks to be and continue, and the same during all that time were ruinous and in bad condition for want of needful and necessary repairing and amending of the same, whereby divers large quantities of the water of the

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(o) This is a sufficient allegation, 766. 2 Saund. 113. 114. *Post*, 349, *Ld. Raym.* 1503. *Salk* 360. 3 T. R. n. (b).

said last-mentioned stream or water-course, which otherwise would have run and flowed to the said last-mentioned works of the said *A B*, and have worked the same on the said, &c. and on divers other days and times, between that day and the day of exhibiting the bill aforesaid, escaped and ran from and out of the said last-mentioned stream or water-course, through the said defects and insufficiencies of the said banks, and became and were wholly lost to the said *A B*, and never did run or flow to the said last-mentioned works, for the working thereof, as the same ought to have done, and otherwise would have done, and thereby the said *A B*, for want of the same water could not, during all or any part of the time last aforesaid, use or work his said last-mentioned works, or follow, use, or exercise his said trade or business therein, in so large, extensive, and beneficial a manner as he ought to have done, and otherwise would have done, and was thereby during all that time deprived of the use and enjoyment of his said last-mentioned works, and of the benefits, profits, and advantages which he otherwise might and would have derived and acquired from carrying on his said trade and business therein, to wit, at, &c. aforesaid.

And whereas also the said *A B*, before and at the time of the committing of the grievances hereinafter mentioned, ^{Fourth count, for widening, &c. cuts from the stream. (p)} ~~was~~ and from thence hitherto hath been, and still is, lawfully possessed of certain other — works, with the appurtenances, situate and being at, &c. aforesaid, near to a certain other stream or water-course, which before and until the time of the committing of the grievances by the said *CD* as hereinafter mentioned, had run and flowed, and had been used and accustomed to run and flow, and of right ought to have run and flowed, and still of right ought to run and flow, in great plenty and abundance, unto the said last-mentioned works of the said *A B*, for the supplying of the same with necessary water for the working thereof, to wit, at, &c. aforesaid. Yet the said *CD*, well knowing the said last-mentioned premises, but contriving and intending unlawfully and wrongfully to injure and prejudice

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(p) As to this count, 6 East, 208. 1 Wils. 175.

*To water-
courses.*

the said *A B* in this behalf, and to deprive him of the use, benefit, and advantage of the water of the said stream or water-course, and to deprive him of the benefit and profit of his said last-mentioned works, and his trade and business as such manufacturer as aforesaid, and to put him to great charge, trouble, expense, and inconvenience, whilst he the said *A B* was so possessed of the said last-mentioned works, with the appurtenances as aforesaid, and carried on his said business therein, to wit, on, &c. aforesaid, and on divers other days and times between that day and the day of exhibiting this bill, wrongfully and injuriously widened, deepened, and enlarged, divers, to wit, — fenders, — sluices, — cuts, and — water-courses, leading from and out of the said stream or water-course in this count first above mentioned, and thereby on those several days and times, drew off and diverted from the same stream or water-course a much greater quantity of water than had before then used to flow or ought then to have flowed from the said stream or water-course, and away from the said last-mentioned works of the said *A B*, and hindered and prevented the water of the said last-mentioned stream or water-course from running or flowing along its usual course to the said last-mentioned works of the said *A B*, and from supplying *the same with water for the necessary working thereof, as the same ought to have done, and otherwise would have done, and wrongfully and injuriously kept and continued the said fenders, sluices, cuts, and water-courses, so widened, deepened, and enlarged, and the water so drawn off in larger quantities as aforesaid, from thence hitherto and by reason thereof, the water of the said stream or water-course, sufficient for the supplying of the said last-mentioned works, during all or any part of that time, could not, nor did run or flow to the same, as the same ought to have done, and otherwise would have done, and the said *A B*, thereby, for want of such sufficient water, could not, during all or any part of that time, use his said last-mentioned works, or follow, use, or exercise his trade and business therein, in so large, extensive, and beneficial a manner as he ought to have done, and otherwise might and would have done, but was thereby during all that time deprived of the use and employment of the said last-mentioned works, and of all the profits, benefits, and advantages, which he otherwise might

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and would have made by carrying on his said trade and business therein, to wit, at, &c. aforesaid. [*Conclusion as ante*, 238.] *For waste, &c.*

[*Commencement as ante*, 238.] For that whereas the said *C D*, before and at the time of the committing of the grievance hereinafter next mentioned, held and enjoyed a certain messuage or dwelling-house, and land, with the *appurtenances, situate, &c. as tenant thereof to the said *A B*, that is to say, as tenant thereof from year to year for so long time as they the said *A B* and *C D* should respectively please, to wit, at, &c. aforesaid. Yet the said *C D* contriving, and wrongfully and unjustly intending to injure, prejudice and aggrieve the said *A B* in his reversionary estate and interest of and in the said messuage or dwelling-house, and land, with the appurtenances, whilst the same so were in the possession of the said *C D*, as tenant thereof to the said *A B* as aforesaid, to wit, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, at, &c. aforesaid, wrongfully and unjustly felled,^(r) cut down and prostrated, and caused and procured to be felled, cut down and prostrated,^(s) divers trees, to wit, — oaks, — elms, — apple trees, — walnut trees, and — other trees of the said *A B* of great value, to wit, of the value of — *l.* then standing, growing and being in and upon the said land, and took and carried away the same, and converted and disposed thereof to his own use. Whereby the

By reversioner in fee against his tenant for years for voluntary waste, by cutting down trees or other waste.^(g)

* 345.

(g) See the precedents, 8 Wentw. Index, 67 to 71. By landlord against tenant, or by remainder-man in fee against tenant for life, see 2 Saund. 252. c. d. Mod. Ent. 201. 3 Lev. 128. 3 East, 38. and as to the mode of stating the particular waste, whether voluntary or permissive, in houses, lands, or woods, 2 Saund. 252. d. e. f. 3 East, 38. This action may be supported by any person who has the immediate remainder or reversion, whether in fee, in tail, for life or years against the tenant in possession, or a stranger; see the instances, 2 Saund. 252. n. 7. where see the mode of declaring in general. If the decla-

ration be against a stranger for waste, at the suit of a reversioner, the right of the plaintiff and the possession of the defendant should be described as in the precedent, *ante*, 336.

(r) It is necessary in this action, as well as in a writ of waste, to state in a declaration, the nature and kind of waste which is the subject of the action. See the several forms in 2 Saund. 252. d. e. f.

(s) When trees are excepted in the lease, trespass is sustainable, and if not excepted, the interest of the lessor in the body of the trees, continues, 1 Saund. 332. n. 5. 7 T. II. 13.

For waste,
 &c.

said *A B* hath been, and still is greatly injured, prejudiced and aggrieved in his reversionary estate and interest of and in the said messuage or dwelling-house and land, with the appurtenances, to wit, at, &c. aforesaid. [*Add a count in trover, and conclude as ante, 238.*]

By landlord
 against tenant
 for not culti-
 vating accord-
 ing to good
 husbandry, or
 for not re-
 pairing, &c.

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For that whereas the said *C D*, heretofore, to wit, on, &c. at, &c. was and from thence hitherto hath been, and still is, tenant to the said *A B* of a certain messuage, farm, land and premises, with the appurtenances, situate at, &c. by reason thereof during all that time it was the *duty of the said *C D*, as such tenant as aforesaid, to manage, use and cultivate, the said farm, lands and premises, with the appurtenances, in a good and husbandlike manner, and according to the custom of the country where the said farm, lands and premises were so situate as aforesaid, to wit, at, &c. aforesaid. Yet the said *C D*, not regarding his duty in that behalf, but contriving, &c. [*State the breaches according to the fact, as in assumpsit, ante, 134 to 138. If the action be for not repairing, the obligation to repair, and the breach should be stated as ante, 137. A landlord has an election either to proceed in case or in assumpsit, when the tenancy is by parol, or in covenant when the tenancy is by deed, ante, 137. in notes, and 2 Bla. Rep. 1111. When the action is for the breach of an express covenant, it is usual in one count immediately after the statement of the tenancy, to allege the terms of the tenancy, the breach of which is complained of as follows, "under and subject to certain terms and conditions, to be performed and fulfilled by and on the part of the said C D, that is to say, "that," &c. Here set forth the covenant in the lease, &c. Add a count in trover, if there be any evidence to support it, and conclude as ante, 238.*]

Against ad-
 ministratrix
 of a deceased
 rector at the
 suit of the suc-
 cessor, for di-
 lapidations.

(f)

[*Commencement as ante, 67.*] For that whereas by the law and custom of *England* hitherto used and approved of, all and singular the rectors and vicars of this kingdom for the time being, are bound and ought to repair and sustain all and singu-

(f) See the precedents, 8 Wentw. 2 Burn. Eccl. Law, 146. 153. 3 Lev. 67. As to the law, see Willes, 421. 268. 1 Lutw. 116. 2 Bulst. 279. 3 Wood. 205. 2 T. R. 636. Wats. Bulst. 158. Moore, pl. 917. Cl. L. 39. Vin. Abr. Dilapid. 15.

for the houses buildings, and tenements of and belonging to their respective rectories and vicarages, and to leave the same so repaired, supported and sustained to their successors, and that if such rectors and vicars do not leave such houses, buildings and tenements to their successors *in repair, but leave them out of repair, and dilapidated then the executors or administrators of the goods and chattels of such rectors and vicars, respectively having sufficient of the goods and chattels of such rectors and vicars are bound and ought to satisfy so much as shall be necessary to be expended or paid for the necessary repairing of such houses, buildings and tenements as aforesaid, to wit, at, &c. And whereas the said *E F* deceased, in his lifetime, and at the time of his death, to wit, on, &c. at, &c. was vicar of the parish of — aforesaid, and was seised in right of the said vicarage, of and in a certain messuage, called the vicarage-house, and the outhouses and gardens thereunto belonging, and also of certain glebe lands lying and being at, &c. aforesaid. And the said *E F* being so seised, afterwards, to wit, on, &c. aforesaid, died, to wit, at, &c. aforesaid, and the said *A B*, afterwards, and after the death of the said *E F*, to wit, on, &c. at, &c. was in due form of law presented, admitted, instituted and inducted^(u) into the said vicarage of the said parish church of, &c. so void by the death of the said *E F* deceased, as aforesaid, and the said *A B* thereby then and there became, and was, and still is, vicar^(x) of the said parish church, and the next successor of the said *E F*, of and to the same, to wit, at, &c. aforesaid. And the said *A B* in fact saith, that at the time of the death of the said *E F*, the said vicarage-house and the outhouses, and the fences of the garden and glebe lands aforesaid, were and still are, out of repair and greatly dilapidated, ruinous, broken and in great decay, for want of due repairing thereof, and were so left by the said *E F* out of repair, and greatly dilapidated, ruinous, broken and in great decay, at the time of his death as aforesaid, *and that the sums of money sufficient for the necessary repairing of the said pre-

For waste, &c.

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(u) It is necessary to state the plaintiff's title. As to the mode, *ante*, 214. And if the plaintiff entitle himself by the resignation of his predecessor, he ought to shew how the resignation was made, *Lutw.* 116. 21 Hen. VIII. c. 13. *Burn. Eccl. Law*, tit. Plurality.

(x) *Ante*, 203. 214.

*For waste,
&c.*

mises, so ruinous and in decay at the time of the death of the said *EF* as aforesaid, will amount to a large sum of money, to wit, to the sum of —*l.* to wit, at, &c. aforesaid, of all which said premises the said *CD*, administratrix as aforesaid, afterwards, and after the death of the said *EF*, and after the said *AB* was so presented, admitted, instituted and inducted to the said parish church as aforesaid, to wit, on, &c.(y) at, &c. aforesaid, had notice and was then and there requested by the said *AB* to pay the said sum of money. Nevertheless the said *CD* so being administratrix as aforesaid, contriving and fraudulently intending to deceive the said *AB* in this behalf, (although she as administratrix as aforesaid, had sufficient of the goods and chattels of the said *EF* deceased, in her hands to be administered,(z) to pay the said sum of —*l.*) hath not yet paid the said *AB* the said —*l.* or any part thereof, or any sum of money for or towards the repairs aforesaid, although often requested so to do, but hath hitherto altogether neglected and refused, and still doth neglect and refuse, to pay him the same, to wit, at, &c. aforesaid. .

For not repairing a fence between plaintiff's and defendant's closes, whereby plaintiff's cattle escaped and were hunted and damaged, and defendant's cattle got into plaintiff's close, and committed damage.(a)

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[Commencement as ante, 238. The venue is local.] For that whereas the said *AB* heretofore, to wit, on, &c. was and from thence and hitherto hath been and still is lawfully possessed, and in the occupation of a certain close, piece or parcel of land, situate, lying and being in the parish of —, in the county of —. And the said *CD* during the time aforesaid, was, and still is, possessed *of, and in the occupation of a certain other close or piece or parcel of land, situate, lying, and being in, &c. aforesaid, and contiguous and next adjoining to the said close or piece or parcel of land, of the said *AB*. And the said *CD*, by reason of the possession of his said close or piece or parcel

(y) The precise day is not material.

(z) This allegation is necessary, as it is held, that an administrator is not liable, unless he has goods of the intestate, *Gibs.* 753. 3 *Keb.* 619.

(a) See the precedents, *Morg. Prec.* 436, 1 *Rich. C. P.* 131. See *Vin.*

Abr. tit. Fences. When the defendant's cattle have escaped into plaintiff's close, he may declare either in case or trespass, 1 *Salk.* 335. The action should in general be against the occupier and not the landlord, who is not in possession, 4 *T. R.* 318. 2 *Hen. Bl.* 350. 12 *Mod.* 168.

of land, with the appurtenances, during all the time aforesaid, of right ought(b) to have repaired and amended, and still of right ought to repair and amend a certain hedge or fence, between the said close of the said *A B*, and the said close of the said *C D*, as often as occasion hath required, to prevent cattle lawfully feeding and depasturing, or being in those respective closes from erring or escaping from and out of the one into the other of the said closes, through the defects and insufficiencies of the said hedge or fence, and doing damage in those respective closes. Yet the said *C D*, well knowing the premises, but contriving and wrongfully and unjustly intending to injure and aggrieve the said *A B* in that behalf, whilst the said *A B* and *C D* were so respectively possessed of their said respective closes, pieces or parcels of land, with the appurtenances as aforesaid, to wit, on, &c. aforesaid, and on divers other days and times between that day and the day of exhibiting this bill, to wit, at, &c. aforesaid, wrongfully and unjustly suffered and permitted the said hedge or fence between the said close, piece, or parcel of land of the said *A B*, and the said close, piece, or parcel of land of the said *C D*, to be and continue, and the same then was ruinous, prostrate, fallen down, out of repair, and in great decay, for want of *needful and necessary repairing and amending of the same, whereby divers cattle, to wit, — horses, &c. &c. of the said *A B*, lawfully feeding and depasturing in the said close, piece or parcel of land of the said *A B* on the several days and times aforesaid, went, erred, and escaped from and out of the same, through the said defects and insufficiencies of the said hedge or fence, into the said close of the said *C D*, and were then and there driven about and hunted in the said close of him the said *C D*. And thereby one of the said cattle, to wit, a certain

Not repairing fences.

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(b) This is now determined to be a sufficient allegation of the defendant's liability to repair, 1 Salk. 335. 1 Vent. 264. 2 Ld. Raym. 804. 3 T. R. 766. It is not necessary to introduce the word "tenants," unless the defendant be owner as well as occupier of the soil, as it is only in the latter capacity that a mere lessee can be sued. 4 T. R. 318. 2 H. Bl. 350. 12 Mod. 168. *Debit reparare* is sufficient, without shewing how the defendant is liable, 3 T. R. 766. Cro. Jac. 665. 1 Salk. 335. 560. 2 Saund. 114. a. b. c.

Not repairing fences.

cow of him the said *A B*, then and there prematurely calved, and became, and was greatly injured and damaged. And he the said *A B* was forced and obliged to lay out and expend a large sum of money, to wit, the sum of 5*l.* in and about the endeavouring to cure his said cow, and also by reason of the said defects and insufficiencies of the said hedge or fence, on the several days and times aforesaid, divers other cattle, as well of the said *C D* as of divers other persons, feeding and depasturing in the said close of the said *C D*, on the several days and times aforesaid, through the said defects and insufficiencies of the said hedge or fence, erred and escaped out of the said close of the said *C D*, into the said close of the said *A B*, and eat up, trod down, trampled upon, consumed, and spoiled, other the grass and herbage of the said close then and there growing and being of great value, to wit, of the value of 20*l.* [*Conclude as ante*, 238.]

For not carrying away great tithes. (*d*)

[*Commencement as ante*, 238. *The venue is local.*] For that whereas the said *C D*, heretofore, to wit, on, &c. was and from thence hitherto hath been, and still is, rector of the rectory of the parish church of —, in the county of —, and as such rector of the said rectory, *he the said *C D* hath been for and during all the time aforesaid, and still is, entitled to have, take, and receive, all and singular the tithes of wheat yearly growing, arising, renewing, and happening upon and from a certain close, or piece or parcel of land, called —, situate, lying, and being in the parish aforesaid, and within the bounds, limits, and titheable places of the said parish and rectory. And whereas the tenants and occupiers of the said close or piece or parcel of land for the time being, *from time*

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(*d*) See the precedents, 8 Wentw. Ind. 72. 1 Ld. Raym. 187. If the proprietor of the tithe leave it on the land more than a reasonable time after it is set out, and after he has notice thereof, the owner of the land cannot justify in trespass turning in his cattle upon the land to depasture

it in the usual course of husbandry, whereby the cattle consumed the tithes; but his remedy is either by distress, damage-feasant, or by action on the case, 8 T. R. 72. And trespass *vi et armis* cannot be supported for such non-feasance, Ld. Raym. 187, Burr. 1891. 1 Roll. 109.

whereof the memory of man is not to the contrary,(e) have been used and accustomed, and ought yearly and every year, when the said close or piece or parcel of land hath been sown with corn, to divide, separate, and set out, the tenth part or tithe, of all corn growing and arising, renewing and happening in every such year, upon and from the said close or piece or parcel of land, and every part thereof, after the reaping and cutting down of the said corn from the nine parts residue thereof upon the said close or piece or parcel of land where the same hath so grown, and there to leave such tenth part or tithe, for the use of the rector of the said rectory, or his farmer of the tithes thereof for the time being, which said tenth part or tithe so as aforesaid, divided, separated, set out, and left the rector of the said rectory, or his farmer of the tithes thereof for the time being, at his own proper costs and charges, in a convenient time next after the dividing, separating and setting out, and leaving thereof, and after notice(f) thereof given to the said rector or farmer for the time being, hath been, during all the time aforesaid, used and accustomed, and ought to carry away from the said close or piece or parcel of land whereon the said tenth part or tithe hath so grown and been so divided, separated and set out, and left as aforesaid.(g) And whereas the said *A B*, before and on the said day of —, in the year aforesaid, was and from thence hitherto hath been and still is, the tenant(h) and occupier of the said close or piece or parcel of land, and which said close or piece or parcel of land, was in that year sown with wheat, and the said *A B*, so being tenant and occupier of the said close or piece or parcel of land, and the said *C D*, so being rector of the said rectory, and so entitled to the said tithes as aforesaid, he the said *A B*, after-

Not carrying away tithes.

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(e) This allegation is not necessary, to set out the tithe, 3 Burr. 1891. 2 and in some cases might be improper, Vent. 48.
5 T. R. 264.

(f) It is necessary to state notice of having set out the tithe, 1 Roll. 1893.
Abr. 648. 2 Vent. 48. 3 Burr. 1892.

(g) As to the inducement and statement of the custom, see 3 Burr. 1893.
1 Stra. 245. But not of being about plaintiff's possession, &c. of the close; see 3 Bulst. 337.

*Not carrying
away tithes.*

wards, to wit, on the said — day of —, in the year aforesaid, at &c. aforesaid, reaped and cut down certain wheat then growing upon the said close or piece or parcel of land, and then and there in due manner divided, separated, and set out thereon, the tenth part or tithe of the said wheat, from the nine parts residue thereof, and there left the same for the use of the said *C D*, so being rector of the said rectory as aforesaid, and afterwards, to wit, on, &c. last aforesaid, at, &c. aforesaid, he the said *A B* gave notice⁽ⁱ⁾ thereof to the said *C D*. Yet the said *C D*, so being rector of the said rectory, and so entitled to the said tithes as aforesaid, well knowing the premises, but contriving, and wrongfully and maliciously intending to injure, prejudice, and aggrieve the said *A B* in this behalf, and to deprive him of a great part of the profit, benefit, and advantage of the said close or piece or parcel of land, did not, nor would, in a convenient^(k) time after the dividing, *separating, setting out and leaving the said tenth part or tithe, of the said wheat from the nine parts residue thereof, and after the said notice thereof so given as aforesaid, take or carry away from the said close or piece, or parcel of land, the tenth part or tithe of the said wheat, or any part thereof, but on the contrary thereof, the said *C D* wrongfully suffered and permitted the said tenth part or tithe of the said wheat to continue and remain upon the said close or piece or parcel of land, where the same had so grown and been divided and separated, set out and left as aforesaid, for a long space of time, to wit, for the space of six^(l) weeks next after the dividing, separating, setting out and leaving the said tenth part or tithe, of the said wheat from the nine parts residue thereof, and after the notice thereof so given as aforesaid, and after the said nine parts residue thereof had been carried away from the said close or piece or parcel of land of the said *A B*. Whereby the said close or piece or parcel of land was for, and during all that time,

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Damage.^(m)

(i) *Vide ante*, 351. note 5.

(k) This is necessary, as a reasonable time must be allowed to carry the tithe away after notice, and before action brought, 3 Bulst. 336. *Ld. Raym.* 189. *Stra.* 245.

(l) It is necessary to state how long the corn remained upon the ground, *Latch.* 8.

(m) It is necessary to state some damage, *Latch.* 8.

greatly incumbered with the said tenth part or tithe of the said wheat, and the said *A B* was thereby for and during all the time aforesaid, hindered and prevented from feeding and depasturing certain cattle upon the said close or piece or parcel of land, from ploughing or sowing the same with —, as he otherwise would have done, and also thereby a certain crop of —, which was afterwards sown upon the said close or piece or parcel of land, for want of being sown in due and proper time, became and was stunted in its growth, unproductive and of little or no use or value to the said *A B*, and by means of the said several promises, he the said *A B* lost, and was deprived of a great part of the profits, benefits and advantages which might and otherwise would have arisen and accrued to him, from the said close or piece or parcel of land, to wit, at, &c. aforesaid.

[*Conclude as ante*, 238.]

Not carrying away tithe.

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IV. FOR TORTS TO REAL PROPERTY INCORPOREAL.

[*Commencement as ante*, 238.] For that whereas the said *A B*, before and at the time of the committing of the grievances hereinafter mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed(o) of a certain messuage, and divers, to wit, — acres of land, with the appurtenances, situate and being in the parish of —, in the county of —; and by reason thereof,(n) during all the time aforesaid, of right ought

For disturbance of plaintiff's common of pasture, by turning sheep on the common.(n)

(n) For the precedents, see 8 Wentw. Index, 50 to 54. 2 East, 154. 3 Wils. 279. Trespass or replevin are in many instances preferable to an action on the case, in order to compel the defendant in his plea, to state his supposed right of common, or other justification.

(o) It is not necessary to state in a declaration any title to the common, either by prescription or otherwise, and it is sufficient to allege that the plaintiff was possessed of certain land, &c. (as the case may be,) and by reason thereof had a right of com-

mon in such a place for his commonable cattle, *levant and couchant* upon his land, and that the defendant disturbed him, whereby the plaintiff could not enjoy his common in so ample a manner as he ought to have done, 1 Saund. 346. n. 2. 2 Saund. 113. n. 1. Com. Dig. Action, Case Disturbance, B. 1. Willes, 621. *Ante*, vol. 1. Index, Title. But the allegation "by reason of the possession," &c. is improper, if the right do not depend thereon, 4 East, 107. 6 East, 438.

*Disturbance
of commons.*

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Injury.

to have had, and still of right ought to have, common of pas-
ture for all his(*p*) commonable sheep, (*q*) *levant and couchant*(*r*)
in and upon his said messuage and land, with *the appurtenan-*
ces, (*s*) in a certain place, waste or common, called the —,
situate, &c. every year at all times of the year(*t*) as belonging
and appertaining to his said messuage and land, with the ap-
purtenances, (*u*) to wit, at, &c. aforesaid. Yet the said *C D*, (*x*)
well knowing the premises, but contriving, and wrongfully and
unjustly intending to injure, prejudice and aggrieve the said
A B in this behalf, whilst he was so possessed of his said mes-
suage and land, with the appurtenances, and entitled(*y*) to such
common of pasture as aforesaid, to wit, on, &c. and on divers
other days and times between that day and the day of exhibiting
this bill, to wit, at, &c. aforesaid, wrongfully and unjustly[†] put
and caused to be put, divers, to wit, — sheep, (*z*) in and upon
the said place, waste or common, called the —, and kept and de-
pastured the same there respectively for a long time, to wit, from
the putting the same there respectively, as aforesaid, hither-

(*p*) This is in general material, 1
Saund. 346. c.

(*q*) Or if for all commonable cat-
tle, say, "for all his commonable cat-
tle;" but if there be any doubt as to
the extent of the right, it is proper
to qualify the statement of the right
of common, and the plaintiff needs
not shew more than makes for him,
2 Hen. Bl. 234. 2 Wils. 269.

(*r*) This is necessary, unless the
right of common be for a certain
number, 1 Saund. 28. n. 4. 346. b. c.
2 Saund. 327.

(*s*) It is not always necessary in
pleading to state the common as ap-
purtenant to land *eo nomine*, for if it
be laid as appurtenant to a thing
which in intendment of law, *prima*
facie comprehends land, it is suffi-
cient, 1 Saund. 346. b. c.

(*t*) This will be taken to mean all
usual times of the day, 2 Hen. Bl.
224. 234. If the right of common
be only at certain times of the year,

it must be so described, see the
form, 2 Saund. 2, 3.

(*u*) *Supra*, n. (*s*). Wils. 319.

(*x*) The declaration for disturb-
ance generally is sufficient, as well
against a commoner as a stranger, 2
Bl. Rep. 817. 3 Wils. 278. 1 Saund.
246. a. and it is not necessary in such
case to shew in the declaration that
the defendant has any right of com-
mon, *id. ibid.* but in an action against
the lord, it is said to be necessary to
state a particular surcharge, 2 Mod.
6. 1 Lutw. 107. 3 Wils. 290. See
the form of a declaration against the
lord, Herne, 125. 1 Saund. 346. a.

(*y*) Plaintiff need not shew that
he turned any cattle on the common
at the time the injury was committed,
2 Bl. Rep. 1233.

(*z*) If the action be brought
against the lord, it is said that the
plaintiff must state a surcharge, 2
Mod. 7. 3 Wils. 278. but not against
a commoner or stranger, 1 Lutw.
101, 102. 1 Saund. 346. a. *Supra*, (*x*).

IV. FOR TORTS TO R. PROPERTY INCORPOREAL.

*356

to.(a) Whereby the said *A B* *on those several days and times, and during all the time aforesaid. was and is greatly injured and disturbed in the use and enjoyment of his said common of pasture there, and could not nor can have or enjoy the same in so large, ample and beneficial a manner(b) as he otherwise during all the time aforesaid, might and would have had and enjoyed the same, to wit, at, &c. aforesaid. [*Conclude as ante*, 238.]

Disturbance of commons. Damage.

[*Same as the last precedent, to the ‡ ante, 355. and then proceed as follows :*—caused to be erected and built divers, to wit, — cottages, and — other buildings, in and upon the said waste or common, and then and there wrongfully and unjustly brought, laid and placed divers, to wit, — pieces of timber, into and upon other parts of the said waste or common, and then and there made a certain deep trench and pit of great length and depth, to wit, — feet in length, and — feet in depth, in other parts of the said waste or common, and wrongfully and unjustly kept and continued the said cottages and buildings so erected and built as aforesaid, and the said pieces of timber so brought, laid and placed as aforesaid, and the said trench and pit so dug and made as aforesaid, there, for a great length of time, to wit, from thenceforth hitherto, &c. Whereby, &c. [*State the damage, as in the last precedent.*]

The like for building, &c. upon the common.

[*Same as the precedent, ante, 354. to the ‡ ante, 355. and then proceed as follows :*—erected and made, and caused and procured to be erected and made, a certain fence, in and upon the said waste or common, and thereby and therewith *then and there enclosed a great part, to wit, — acres of the said waste or common, and separated and divided the same from the residue of the said waste or common, and wrongfully and

The like for enclosing part of the common.

* 357

(a) If cattle are permitted to depasture the common, whether they belong to a stranger, or are the supernumerary cattle of a commoner, or whether they are driven or escape there, a commoner may have an action on the case, in which it is not necessary to prove that he has sustained any *specific damage*, the in-

fraction of the *right* being a sufficient injury, 1 Saund. 246. a. 2 East, 154.

(b) This allegation is necessary, 1 Saund. 346. a. 9 Co. 113. a. 2 Bl. Rep. 1235. but no evidence of any specific damage needs be adduced, *id. ibid.* 2 East, 154. *Ante*, 355. n. (a).

*Disturbance
of commons.*

unjustly kept and continued the said fence so erected and made as aforesaid, and the said part of the said waste or common, so separated and divided as aforesaid, for a long space of time, to wit, from thence hitherto. Whereby, &c. [*Damage as ante, 355.*]

*The like
for digging
turves.*

*Same as the precedent, ante, 354. to the ‡ 355. and then proceed as follows :—*with spades and other instruments, cut and dug a great part, to wit, 100 square yards, of the turf of the said waste or common, and the turves, to wit, — cart loads of turves there then cut and dug, took and carried away. Whereby, &c. [*Damage as ante, 355. See 7 East, 121.*]

For disturbance of common of turbary. (c)

[*Same as the precedent, ante, 354. to the obelisk, omitting the statement of possession of land, (d) and then proceed as follows :—*of turbary, in a certain waste or common, called, &c. situate at, &c. to cut, dig, and take turf and peat in and upon the said waste or common, and to carry away the same for necessary fuel, to be spent, burnt and consumed in and upon his said messuage, with the appurtenances, (e) every year, and at all times of the year, as occasion hath required, as to his said messuage, with the appurtenances, belonging and appertaining. Yet the said *C D* well knowing the premises, but contriving, and wrongfully and unjustly intending to injure the said *A B*, in this behalf, whilst he was so possessed of his said messuage, with the appurtenances, and entitled to such common of turbary as aforesaid, to wit, on, &c. and on divers other days and times between *that day and the day of exhibiting this bill, at, &c. aforesaid, wrongfully and unjustly cut, dug, took and carried away, and caused to be cut, dug and carried away, divers large quantities, to wit, fifty cart-loads of the turf then growing and being on and upon the said common or waste. Whereby the said *A B* on those several days and times, and during all the time aforesaid, was and is greatly injured and disturbed in the use and enjoyment of his said common of turbary there, and could not, nor can have, and enjoy the same in so large,

* 358

(c) See the precedents, 8 Wentw. 597. 513. and *id.* Index, 50, 51.

(d) Common of turbary is incidental to a messuage, and not to land, 4 Co. 37. a. 7 East, 121.

(e) It is necessary in general to state in the declaration that the turves were to be used in the house, 1 Lev. 231. Sid. 354. 7 East, 121.

ample and beneficial a manner as he otherwise during all the time aforesaid, might and would have had and enjoyed the same, to wit, at, &c. aforesaid. [*Conclude as ante, 238.*]

[*Same as the precedent, ante, 354. to the † omitting the word "common," and the statement of the possession of land (g) and then proceed as follows:*—and take reasonable estovers of the bushes and underwood, standing and growing in and upon a certain place, waste or common, called the —, and situate at, &c. and to carry the same from thence to the said messuage, with the appurtenances, to be burnt, spent and consumed for necessary fuel therein, every year, at all seasonable times of the year, at his and their free will and pleasure, as belonging and appertaining to the said messuage, with the appurtenances. Yet, &c. [*Same as the last precedent, only instead of "turf," say "bushes and underwood," and instead of "common of turf-bary," say, "common of estovers."*]

Disturbance of commons.

For disturbance of common of estovers. (f)

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For that whereas the said *A B* before, and at the time of the committing of the grievance by the said *C D* as whereinafter next mentioned, was and from thence hitherto hath been, and still is, lawfully possessed (i) of a certain messuage and garden thereto belonging, with the appurtenances, situate, lying and being, at, &c. And by reason thereof (k) he the said *A B*, during all the time aforesaid, ought to have had,

For obstructing plaintiff's private right of way, appurtenant to a messuage and garden. (h)

(f) See the precedents, 8 Wentw. Index, 50, 51. Thorp. Ent. 377. 3 Wils. 456. Morg. Prec. 456. and the notes to the last precedent, which are applicable.

(g) *Ante*, 357. n. (d).

(h) As to the private ways in general whether by grant, prescription, or of necessity, see 1 Saund. 323. n. 6. Com. Dig. tit. Chimin, D. See the precedents, 8 Wentw. Index, 55 to 57. 1 Lutw. 19. 4 T. R. 794. 3 T. R. 766. 3 Ld. Raym. 85. for not repairing a private way, and 3 T. R. 766. 2 Saund. 113. n. 1. 172. a. n. 1. Ld. Raym. 1096. *Ante*, 354. n. (o). As to the

statement of the right, 1 Vent. 274. 2 Lev. 148. 3 Keb. 528. 3 Lev. 266. 1 Lutw. 120. 2 Ld. Raym. 751. 1090.

(i) This allegation is sufficient, without stating any prescriptive right, 2 Saund. 113. a. Lutw. 119. See also *ante*, 354. n. (o).

(k) This is in general a sufficient description of the right, *id. ibid.* 2 Saund. 114. a. 1 Saund. 346. n. 2. *Ante*, 356. n. (o). But if the right of way be not by reason of possession, but by special agreement, &c. it would be improper, 4 East, 107. 6 East, 438.

*Disturbance
of ways.*

* 360

Injury.

and still of right ought to have a certain way^(l) from and out of the said garden, unto, into, through and over a certain close, in the parish aforesaid,^(m) and from and out of the same, unto and into a certain wharf or quay, of the said *A B*, in the parish aforesaid,⁽ⁿ⁾ and so back again from the said wharf or quay, unto and into, through, over and along the said close, and from and out of the same unto and into the said garden of the said *A B* for himself and his *servants, on foot,^(o) to go, return, pass and repass, every year, and at all times of the year, at his and their free will and pleasure, as to the said messuage and garden, with the appurtenances of the said *A B* belonging and appertaining.^(p) Yet the said *CD* well knowing the premises, but wrongfully and unjustly contriving, and intending to injure the said *A B*, in that behalf, and to deprive him of the use and benefit of his said way, whilst he the said *A B* was so possessed of his said messuage and garden, with the appurtenances as aforesaid, to wit, on, &c.^(q) and on divers other days and

(*l*) The term "passage," it is said, is too general, Yelv. 163, 164. 1 Brownl. 216.

(*m*) Where the right of way is stated to be over a private close, &c. the local situation thereof should be stated, Noy, 9.

(*n*) In *Rouse v. Bardin*, 1 Hen. Bl. 353. Mr. J. Wilson observed, "that in pleading a public highway, it is not necessary to state either the *terminus a quo*, or the *terminus ad quem*; but where it is a private way, it is necessary to state them, because private ways are given for particular purposes, and the justification must shew that they were used for those purposes." It is therefore necessary, in a declaration of this nature, either to shew that the way leads to a common highway, 8 East, 4. 2 Leon. 10. 2 Saund. 158. d. Com. Dig. Action, Case, Disturbance, B. 1. or if it lead to a private close, to state some interest of the plaintiff therein, Noy, 86. Latch. 160. Com. Dig. Action, Case, Disturbance, B. 1. Vin. Abr.

tit. Chimin, H. pl. 14. Com. Dig. tit. Chimin, D. 2. When it is doubtful whether the way may not have been extinguished by unity of possession, it may be advisable to state the right of way to be "*towards*," &c. 1 East, 377. 381. 1 B. & P. 371.

(*o*) It should be shewn whether the way be a *cart-way*, *horse-way*, or *foot-way*, Yelv. 164. Com. Dig. Action, Case, Disturbance, B. 1. Though in the case of a public way, the term "common highway" signifies a way for all manner of things, 2 Saund. 158. d. 8 East, 4. 1 Hen. Bl. 355.

(*p*) See the precedent in 1 Lutw. 119. It is said that these words are improper, on the ground that a way is an easement and not an appurtenance, Yelv. 159. 1 Bulst. 47. Com. Dig. tit. Chimin, D. and in a declaration it appears not necessary to insert this allegation, and in some cases, it would be improper, 4 East, 107. 6 East, 448.

(*q*) The day is not material.

times between that day and the day of exhibiting this bill, at, &c. aforesaid, wrongfully and injuriously^(r) placed and erected, and caused and procured to be placed and erected, divers large quantities of boards, planks and wood, in and across the said way, and put and placed, and caused and procured to be put and placed, divers other large quantities of wood and timber in the said way, and kept and continued the said boards, planks and wood, so placed and erected in and across the said way as aforesaid, and also the said other wood and timber in the same way as aforesaid, for a long space of time, to wit, hitherto, and thereby during all the time aforesaid, the said way was and still is greatly obstructed and stopped up, and the said *A B* by means thereof, could not, during the time aforesaid, or any part thereof nor can he now have or enjoy his said way, as he of right ought to have done, and otherwise might and would have done, and hath been, and is by means of the premises deprived of the use, benefit and advantage thereof, to wit, at, &c. aforesaid.

Disturbance of ways.

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And whereas also the said *A B* before and. at the time of the committing of the grievances hereafter mentioned, was, and from thence hitherto hath been, and still is, lawfully possessed of a certain other messuage, with the appurtenances, situate —, &c. and by reason thereof, he the said *A B*, during all the time aforesaid, ought to have had, and still of right ought to have a certain way from the said messuage of the said *A B*, unto, into, through, and over a certain close in the parish aforesaid, unto and into a certain common and public highway,^(t)

Second count, for a way to a messuage from a highway, without stating the means of obstruction. (e)

(r) It is not necessary to state the means by which the way was obstructed; it is sufficient to say, *quod obstruxit or obtupavit*, without saying how, 3 Leon. 13. Willes, 583. 1 B. & P. 180. Com. Dig. Action, Case, Disturbance, B. 1. Cro. Jac. 606. Ld. Raym. 452. See the next count.

(e) See the precedent, Lutw. 119. and the notes to the preceding count.

(t) The term "highway" is sufficient. 2 Saund. 158. b. n. 4. 8 East, 4. Lutw. 119. The *terminus ad quem* may be laid to be a public highway, and will be proved by evidence of a public footway, and it is not necessary to state what description of highway, 2 Leon. 10. 2 Saund. 158. a. *Quere* 8 East, 4.

*Disturbance
of ways.*

Injury.

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in the county aforesaid, and so back again from the same common and public highway, unto, into, through, and over the said close, and from thence into the said messuage of the said *A B* for himself and his servants to go, return, pass, and repass, on foot, every year, at all times of the year, at his and their free will and pleasure, as to his said last-mentioned messuage, with the appurtenances belonging and appertaining. Yet the said *C D*, well knowing the said last-mentioned premises, but wrongfully and unjustly intending to injure the said *A B* in that behalf, and to deprive him of the use and benefit of his said last-mentioned way, whilst he the said *A B* was so possessed of the said last-mentioned messuage, with the appurtenances, and so entitled to the said way as aforesaid, to wit, on, &c. aforesaid, and on divers other days and times *between, &c. at, &c. aforesaid, wrongfully and injuriously stopped up, and obstructed the said last-mentioned way, and the said *A B* by means thereof, could not, during the time aforesaid, nor can he have or enjoy his said last-mentioned way, as he of right ought to have done, and otherwise might and would have done, and hath been, and is deprived of the use, benefit and advantage thereof, to wit, at, &c. aforesaid.—[*Conclusion as ante*, 238.]

For disturbance of a
pew.(u)

[*Commencement as ante*, 238. *The venue is local.*]—For that whereas the said *A B* before, and at the time of the committing of the grievance hereinafter next mentioned, was and from thence hitherto hath been, and still is, lawfully possessed of, in a certain messuage, with the appurtenances, situate, &c. and therein during all the time aforesaid, inhabited and dwelt, and still doth inhabit and dwell, with his family; and by reason thereof he the said *A B*, during all that time aforesaid, until the time of the committing of the grievance by the said *C D* as hereinafter next mentioned had, and still of right ought to have, for himself and his family inhabiting in the said messuage, with the appurtenances, the use and benefit of a certain pew, in the parish church of, &c. aforesaid, to hear and attend divine service, celebrated therein, as to the said messuage, belonging

(u) As to the precedents of declarations for disturbance of seats in churches, see 8 Wentw. 55. For-
est's Rep. Excheq. 14. 3 T. R. 659.
5 T. R. 296. 1 Lev. 71. 1 Sm. 303.
2 Lev. 193. 3 Lev. 73. 1 Wils. 326.
1 T. R. 423.

and appertaining. Yet the said *C D* well knowing the premises, but contriving, and wrongfully and unjustly intending to injure and prejudice the said *A B* and to deprive him of the use and benefit of the said pew, whilst he the said *A B* was so possessed of his said messuage, with the appurtenances, and dwelt and inhabited therein as aforesaid, and was entitled to the use and benefit of the said pew as aforesaid, to wit, on, &c. and on divers other days and times, between that day and the day of exhibiting this bill, at, &c. unlawfully, and without the leave or license, and against the will of the said *A B* entered, and caused and procured divers other persons to enter, and continue in the said pew during the celebration of divine service in the said church, and thereby greatly disturbed the said *A B* in the enjoyment of the said pew, and prevented him from having the use and benefit thereof in so full and ample a manner as he otherwise might and would, and ought to have done, and also unlawfully tore, wrenched, broke and damaged the door of the said pew, and also unlawfully shut and fastened the door thereof, and kept the same so shut and fastened for a long space of time, to wit, hitherto, and thereby, during all that time, hindered and prevented the said *A B* and his family inhabiting in the said messuage, with the appurtenances, from sitting in and using the said pew for the purpose aforesaid, and whereby he the said *A B* could not, during the time aforesaid, have or enjoy the use of the said pew for himself and his family, inhabiting the said messuage, in so ample and beneficial a manner as he otherwise might, and ought to, and would have done, and hath been greatly disturbed and molested in the use and enjoyment thereof, to wit, at, &c. aforesaid.—[*Second count similar to the first, except, that instead of the words "use and benefit," say "the right privilege and liberty of sitting in the said pew," and conclude as ante, 238.*]

*Disturbance
of pews.
Injury.*

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For the precedents and mode of declaring for a disturbance, subtraction, or other injury to FRANCHISES, see 4 Mod. 423.—

1 *Show.* 18. 8 *Wentw. Ind.* 58. To TOLLS in a market, &c.
2 *Saund.* 172. n. 1. 1 *Bos. & Pul.* 400. *Owen*, 109. *Cro.*
Jac. 43. 122, 123. 3 *Lev.* 190. 2 *Lutw.* 1517. 6 *East*, 438.
8 *Wentw. Ind.* 58. For NOT GRINDING CORN at plaintiff's
ANCIENT MILL, 2 *Saund.* 112, 113. n. 1. 172. n. 1. 8 *Went Ind*

For disturbance of franchises, tolls, offices, &c.

* *Disc on sta- 58. Of OFFICES, 10 Co. 59. b. Cro. Eliz. 335. 8 Wentw. Ind. 54. Of FERRIES, Willes, 508. 8 Went. Ind. 58. 2 Saund. 114.*

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* *Declarations on statutes so much depend on each particular statute, that no general precedent can well be given; see the forms referred to, 8 Wentw. Ind. 58. and the notes to the precedent, ante, 185. in debt by the party grieved; and Com. Dig. tit. Action upon Statute, tit. Pleader, 2 S. to 2 S. 30. On the, &c. RIOT ACT, 1 East, 615. 3 East, 400. 457. On the stat. of Winton, 13 Edw. I. RUE AND CRY, with notes, see 2 Saund. 374.*

VI. DECLARATIONS IN REPLEVIN.

In the King's Bench (or "Common Pleas,")

— next after (b) —

in Trinity Term, 47 Geo. III. —

Declaration in
replevin in K.
B. or C. P. (a)

—, (to wit.) (c) *C D* was summoned to answer *A B* of a plea, wherefore he took the cattle, (or "*the goods and chattels*," or "*the corn*,") of the said *A B* and unjustly detained the same against sureties and pledges, until, &c. and thereupon the said *A B* by *E F* his attorney, complains, for that the said *C D* on the — day of — *A. D.* — (d) in the parish of —, in the county of —, in a certain dwelling-house there, (e) [or if on land, "*in a certain close*," or "*common*,"

(a) As to the declaration in replevin in general and precedents, see Com. Dig. tit. Pleader, 3 K. 10. Bac. Abr. tit. Replevin. 8 Wentw. Index, 219. 2 Saund. 194. a. 282. 310.

(b) As to the title of the term, see ante, 1. n. (a).

(c) The venue in this action is local, and the place is material and traversable, 1 Saund. 347. n. 1. See *infra*, n. (e).

(d) The precise day is not material. The plaintiff may in the same declaration, count for several takings,

part at one day and place, and part at another day and place, F. N. B. 68.

(e) The action of replevin requires more certainty in the description of the place, where the distress was taken, than that of trespass, the place being material and traversable, Hob. 16. Willes, 478. 2 Wils. 354. and if the defendant plead *non cepit*, and the plaintiff cannot prove a caption, or that the defendant had the cattle, &c. in the place stated in his declaration, he will be nonsuited, (1 Stra. 507, 508. 2 Mod. 199. 1 Saund.

there called *—(c),] took the cattle,(f) (or "goods and chattels,") to wit, —(g) of him the said A B,(h) of great value, to wit, of the value of—l.(i) and unjustly detained the same, against sureties and pledges, until, &c.(k) wherefore *the said A B saith, that he is injured, and hath sustained damage to the value of —l.(l) and therefore he brings his suit, &c.

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347. n. 1. acc. 2 Wils. 354. Gilb. 166. *semb. cont.*) and if the place be omitted the defendant may demur, 2 Wils. 354. and it is not sufficient merely to state that the caption was made in a parish or town, but it is usual to add that the cattle, &c. were taken "in a certain place there called, &c. Cro. El. 896. Hob. 16. Moor, 578. 1 Brownl. 186. 1 Sid. 9, 10. 20. Carth. 186. However, according to the present practice, it is sufficiently certain to state, that "the defendant, in the parish "or town" of —, in the county of —, in a certain close, "or a certain messuage," there took the cattle," &c. without stating the name of the close, or the street where the house is situate; and in all cases, if the particular place be omitted, the objection will be aided by the defendant's pleading over or after verdict, *id. ibid.* If the defendant lead or have the cattle, &c. through or in a close or place different to that in which they were originally taken, the plaintiff may state the caption to have been in either, though it is more usual to insert the place where the cattle were first taken, 2 Wils. 354. 1 Saund. 347. n. 1. Com. Dig. Pleader, 3 K. 10. If several cattle be taken, some in one place and some in another, it should be shewn in the declaration how many were taken in each, Com. Dig. Pleader, 3 K. 10.

(f) If *standing corn*, &c. be taken under the 11 Geo. II. c. 19. s. 8. the description will be as follows: "in a certain field there called —, took the corn of the said A B, to wit, — acres of standing wheat, there then growing and being, and divers, to wit, — cart-loads of other wheat of the said A B, there then also being, of great value, to wit, &c. *ut supra.*"

(g) The description and number of the cattle or goods taken should be stated with certainty; as to the degree of certainty, see 2 Saund. 74. b. Rep. temp. Hardw. 119. 2 Stra. 1015. Com. Dig. Pleader, 3 K. 10. Bac. Abr. tit. Replevin.

(h) The property must be correctly stated, and several persons having a distinct interest cannot join, Com. Dig. Pleader, 3 K. 10. *Ante*, vol. 1. 52.

(i) It is not necessary in replevin in the *detinuit*, which is now the usual form of action, to state the price or value of the cattle or goods: see the reason, 2 Saund. 320. n. 1. *aliter*, if the declaration be in the *detinet*, Com. Dig. Pleader, 3 K. 10.

(k) This is the proper form, when the cattle have been replevied, Com. Dig. Pleader, 3 K. 10.

(l) Any sum sufficient to cover the amount of the damages really sustained.

Replevin.

The like in
a county
court. (m)*In the County Court of —.*In the County Court
of —,

(to wit.) *C D* was summonsed to answer *A B* of a plea, wherefore he took the cattle, (or "*the goods and chattels*," or "*the corn*,") of the said *A B*, and unjustly detained the same against sureties and pledges, until, &c. and thereupon the said *A B* by *E F* his attorney complains, for that the said *C D*, on the — day of —, *A. D.* —, in the parish of —, in the county of —, and within the jurisdiction of this court(n) in a certain dwelling-house there, [or if on land, "*in a certain close*," or "*in a certain common there called —*,"] took the cattle, (or "*goods and chattels*," or "*the corn*,") to wit, &c. of him the said *A B*, of great value, to wit, of the value of —*l.* and unjustly detained the same against sureties and pledges, until, &c. wherefore the said *A B* saith that he is injured, and hath sustained damage to the value of *50l.*(o) and therefore he brings his suit, &c.

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*VII. DECLARATIONS IN TRESPASS.

COMMENCEMENTS AND CONCLUSIONS.

Markham and Le Blanc,

— next after —(n)

in — Term, 47 Geo. III.

Commence-
ment and con-
clusion in
King's Bench.

—(to wit.)(g) *A B* complains of *C D*, being in the custody of the marshal, of the marshalsea of our lord the now

(m) See the precedents, 2 Rich. C. P. 346. Co. Ent. 314. b. and the notes to the last precedent which are applicable.

(n) As to the necessity for this allegation, see Co. Ent. 314. b. 2 Rich. C. B. 346. 1 Saund. 74. n. 1.

(o) In replevin by plaint the sheriff may hold plea in his county court to any amount though above 40*l.* by virtue of the statute Marlbridge, 2 Inst. 139. 312. 2 Rich. C. P. 347.

(p) It is in general advisable to intitle the declaration specially, see the note, ante, 1. n. (a), and 2 Saund. 1. n. 1.

(g) In trespass to persons or to personal property the venue is trans-

king, before the king himself, of a plea of trespass. For that(r) the said C D, on the — day of —, in the year of our Lord —,(s) with *force and arms, &c.(t) made an assault, &c. to wit, at, &c. [Here state the trespasses according to the facts, and as in the subsequent precedents, and conclude as

*Commence-
ments and
conclusions.*

* 368.

sitory, unless in actions against justices of the peace, constables, &c. *ante*, vol. 1. Index, tit. Venue. 21 Jac. I. c. 12. But in trespass to real property the venue is local, and in such an action, if there have been any removal of a personal chattel, it is usual to add a count *de bonis asportatis*, in order to avoid the danger of misdescription of the local situation in the first count, 1 T. R. 479.

(r) The word *whereas* or *wherefore*, the defendant committed the trespass, would in K. B. be bad on special demurrer, *ante*, vol. 1. Index, tit. Declaration. 2 Salk. 636. 1 Stra. 621. Com. Dig. Pleading, C. 86. Andr. 282. But when the proceedings are by original, or in C. P. the count part may be aided by the prior recital of the supposed writ, and even a special demurrer could not then be supported, *id. ibid.* 1 Wils. 99. Barnes, 452. 2 Wils. 203.

(s) In trespass for an assault, a declaration charging "that the defendant on such a day, and on divers other days and times, &c. made an assault, would be bad on special demurrer, as one assault cannot be made on different days, 6 East, 395. 391. Though in trespass for debauching a daughter, or for crim. con. the rule is otherwise, 6 East, 391. *Ante*, 265. n. (r). In trespass to lands, or for cutting down or carrying away trees, or for killing hares, &c. it may be stated that the defendant committed the trespasses on divers days and times, but trespass cannot be laid of loose chattels with a *continuando*, Salk. 638, 639. Bull.

N. P. 86. Com. Dig. Pleading, 3 M. 10. 1 Saund. 24. n. 1. Formerly it was usual to declare with a *continuando*, as in 1 Saund. 24. but now it is more usual in trespass to land, to state "that the defendant, on such a day, in such a year, and on divers other days and times, between that day and the day of exhibiting this bill, (or in C. P. "between that day and the commencement of this suit,") with force and arms, &c. committed the trespasses," and the plaintiff may give in evidence any number of trespasses committed during the specified time. If only one day be mentioned, the plaintiff will not be permitted to give evidence of more than one act of trespass, and where the trespasses are stated, as above, to have been committed on divers days and times, between such a day and such a day, if the plaintiff intend to give evidence of repeated acts of trespass, he must confine himself to the time in the declaration, and therefore it is in general advisable in trespass to real property, to lay the first day so far back as to be certainly anterior to the first act of trespass; however, as the precise day is not material in trespass, either to the person, personal, or real property, the plaintiff may succeed upon the trial as to any one single act of trespass, though committed prior to the time mentioned in the declaration, Bull. N. P. 86. 1 Saund. 24. n. 1. 2 Saund. 5. n. 3. Co. Lit. 283 a. Com. Dig. Pleading, C. 19.

(t) A trespass should be stated to have been committed *vi et armis*,

Commence-
ments and
conclusions.

Conclusion.

follows:] And other wrongs^(u) to the said *A B* then and there did against the peace of our said lord the king,^(x) and to the damage of the said *A B*, of *—l(y)* and therefore he brings his suit, &c. Pledges, &c.

* 369

**In the Common Pleas.*

—next after—

in—Term, 47 Geo. III.

The like in
the common
pleas. (z)
Writ part.

—, (to wit.) *C D* was attached to answer *A B* of a plea, wherefore he the said *C D* with force and arms, &c. made an assault upon the said *A B*, to wit, at, &c. and there gave and struck, &c. —

[*The declaration in trespass in the Common Pleas, usually recites the writ supposed to have been issued, and states the different acts of trespass at length in one or more counts, but without particularizing the time when the trespass was committed, the number or quantity of the goods, &c. taken, or the value thereof, or the amount of the damage sustained, see 1 Saund. 318. n. 3. and the precedents of declarations for trespass to the person, in 9 Wentw. 16, 17. for trespass to personal property, id. 65. and for trespass to real property, id. 113. and Boote's suit at law, 193, 194. The declaration then proceeds as follows:]* —

Conclusion of
writ part.

And other wrongs to the said *A B*, then there did to the great damage of the said *A B*, and against the peace of our lord the now

Com. Dig. Pleader, 3 M. 7. but the omission will be aided, unless the defendant demur specially, 2 Saund. 81. n. 1. *Ante* vol. 1. Index, tit. *Vi et armis*.

(u) As to the *alia enormia*, see 1 vol. Index, tit. Declaration and *Alia enormia*. Cro. Jac. 664.

(x) The declaration in trespass should be *contra pacem*, Com Dig. Pleader, 3 M. 8. but the omission is aided unless the defendant demur

specially, *ante*, vol. 1. Index, tit. *Contra Pacem*.

(y) Any sum sufficient to cover the amount of the damages, which it may be probable the jury will give.

(z) Observe the notes to the last precedent. This is the usual mode of declaring in trespass in the common pleas, but to avoid the prolixity and expense occasioned by the recital of the supposed writ, it may be advisable to adopt the next form, see the notes thereto.

king, &c. And thereupon the said *A B* by *E F* his attorney complains, for that the said *C D* on, &c. with force and arms, &c. made an assault upon the said *A B*, to wit, at, &c. and then and there gave and struck, &c.

*Commence-
ments and
conclusions.*

Count part

[*Here state the trespasses precisely as in the preceding part of the declaration, with the addition of time, number, quantity, and value, as in the count part of the precedents, above referred to, and conclude as follows:*]

† And other wrongs to the said *A B* then and there did, to the great damage of the said *A B*, and against the peace of our said lord the king. Wherefore the said *A B* saith that he is injured, and hath sustained damage to the amount of —*l.* and therefore he brings his suit, &c.

Conclusion.

[*Omit Pledges.*]

* *In the Common Pleas.*

• 370

—next after—
in—Term, 47 Geo. III.

—, (to wit.) *C D* was attached to answer *A B*, of a plea of trespass, and thereupon the said *A B*, by *E F* his attorney, complains against the said *C D*, for that the said *C D*, on, &c. with force and arms, &c. made an assault, &c. to wit, at, &c. [*here state the trespasses as in the King's Bench, and as in the count part of the last precedent, and according to the facts, and which may be stated as in the following precedents, and conclude as in the last precedent from the obelisk.*]

The like in
the common
pleas in a more
concise form.
(a)

(a) It appears from 1 Saund. 518. n. 3. that at the present time a declaration in trespass in the common pleas, or by original in the king's bench, would probably be deemed sufficient, though it merely state as above, that the defendant was attached to answer the plaintiff in a plea of trespass, without setting forth the supposed writ; and certainly as this concise mode avoids much prolixity and expense, it is preferable to the form usually adopted.

Commence-
ments and
conclusions.

In the Exchequer of pleas.

— next after —
in — Term, 47 Geo. III.

The like in the
exchequer. (b)

—, (to wit.) *A B*, a debtor to our sovereign lord the now king, cometh before the barons of his majesty's exchequer, on —, the — day of —, in this same term, by *E F* his attorney, and complains by bill against *C D* present here, in court, the same day, of a plea of trespass, for that, &c. [*proceed precisely as in King's Bench, ante, 367. and conclude as ante, page 4. n. (o).*]

* 371

*1. TO PERSONS

For an assault
spitting in
face, pulling
nose and hair,
beating with
sticks and fists,
pulling about,
throwing
down, kicking
and tearing
clothes. (c)

[*Commencement and conclusion in King's Bench, Common Pleas or Exchequer, as ante, 367 to 370.*]—For that (d) the said *C D* on, &c. (e) with force and arms, (f) &c. made an assault upon the said *A B*, to wit, at, &c. (g) and then and there spit in the face of him the said *A B*, and with great force and violence, seized and laid hold of the said *A B* by his nose, and greatly squeezed and pulled the same, and then and there plucked, pulled and tore divers large quantities of hair from

(b) Observe the notes to the precedent, *ante*, 367, 368. which are in general applicable.

(c) See the precedents, 9 Wentw. Index, 3 to 9. and observe the notes to the precedents, *ante*, 367 to 370. The principal formal allegations necessary to be attended to in framing declaration for an assault or other trespass, are, 1st. The statement of the time when the trespass was committed. 2dly. The insertion of the words *vi et armis*. 3dly. The venue or place. 4thly. That the matter injured was the property of the plaintiff, and its value. 5thly. The insertion of the words "*alia enormia*." 6thly. The words "*contra pacem*," and

7thly. The conclusion *ad damnum*, &c. In other respects the declaration in trespass should be a full statement of the injuries in the order in which they were committed, and of all the consequent damages; and no allegation should be inserted unless there be a probability of its being proved in evidence.

(d) The word "*whereas*" would be improper, *ante*, 367. note (r).

(e) On divers days and times, would be improper in this case, *ante*, 367. note (s).

(f) *Ante*, 368. note (t).

(g) The venue is in general transitory, *ante*, 367. note (q).

and off the head of him the said *A B*, and then and there with a certain stick, and with his fists, gave and struck the said *A B* a great many violent blows and strokes on and about his head, face, breast, back, shoulders, arms, legs, and divers other parts of his body; and also, then and there, with great force and violence, shook and pulled about him the said *A B*, and cast and threw him the said *A B* down to and upon the ground, and then and there violently kicked the said *A B*, and gave and struck him a great many other blows and strokes, and also then and there, ^(h) with great force and violence, rent, tore and damaged, the clothes and wearing apparel, ^(h) to wit, one coat, one waistcoat, one pair of breeches, one cravat, one shirt, one pair of stockings, and one hat of the said *A B*, ⁽ⁱ⁾ of great value, to wit, of the value of 20*l.* which he the said *A B* then and there wore, and was clothed with. By means of which said several premises, he the said *A B* was then and there greatly hurt, bruised and wounded, and became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, for the space of — weeks then next following, (or “*hitherto*,”) during all which time, he the said *A B* thereby suffered and underwent great pain, and was hindered and prevented from performing and transacting his necessary affairs and business, by him during that time to be performed and transacted, and also, thereby, he the said *A B* was forced and obliged to, and did necessarily pay, lay out and expend a large sum of money, to wit, the sum of —*l.* of lawful

Assault and Battery.

* 372

Damage, that plaintiff became bruised and ill, unable to transact his business, and was put to expense about his cure. (k)

(h) If there were a substantive and independent injury to *personal property*, it is advisable to state such injury in a distinct count, in order to entitle the plaintiff to full costs, for where an injury to personal property is either laid in the declaration, or proved merely in aggravation of damages, as a mode or qualification of the assault and battery or local trespass, it is within the statute 22 & 23 Car. II. c. 9. so where a *laceravit* or tearing of the plaintiff's clothes is laid in the declaration, or found by the jury to be merely consequential to or committed at the same time as an

assault and battery, the plaintiff recovering less than 40*s.* damage, is not entitled to full costs without a certificate, Tidd's Pract. 833. 3 edit. 1 Hen. Bl. 291. 5 T. R. 482. See the count *de bonis asportatis*, *post*, p. 379.

(i) A property or possession in the plaintiff must be stated, Com. Dig. Pleader, 3 M. 9.

(k) As to the statement of the special damage, *ante*, vol. 1. Index, tit. Damage. As to the words wounding and mayhem, see 1 Ld. Raym. 176. 3 Salk. 115 S. C. 1 Wils. 5. Tidd's Pract. 806.

*Assault and
Battery.*

money of *Great Britain*, in and about endeavouring to be cured of the bruises, wounds, sickness, soreness, lameness and disorder aforesaid, occasioned as aforesaid, to wit, at, &c. aforesaid. [*It is usual to add a count for a common assault, as follows :*]

Second count
for a common
assault. (l)

* 373

And also for that the said *C D*, on, &c. with force *and arms, &c. made another assault on the said *A B*, to wit, at, &c. and then and there again beat, bruised, wounded, and ill-treated him, *insomuch that his life was thereby then and there greatly despaired of*, (m) and other wrongs, &c. [*the conclusion in King's Bench, Common Pleas, or the Exchequer, is to be as ante, 367 to 371.*]

The like for a
battery, &c.
on board a
ship. (n)

[*Commencement and conclusion in the King's Bench, Common Pleas, or Exchequer, as ante, 367 to 370.*] For that the said *C D*, on, &c. with force and arms, &c. made an assault on the said *A B* in and on board of a certain ship or vessel, called the ———, then on the high seas, to wit, in *London*, in the parish of *St. Mary-le-Bow*, in the ward of *Cheap*, and then and there, with great force and violence, struck and knocked the said *A B* down, to and upon the deck of the said ship or vessel, and then and there, with his fists, and also with a certain rope, gave and struck the said *A B* a great many violent blows and strokes on and about his head, face, breast, back, arms, legs, and divers other parts of his body; and also then and there without the license or consent, and against the will of the said *A B*, put and placed him the said *A B* into irons, and then and there, without any reasonable or probable cause whatsoever,

(l) If there have been several assaults at different times, for which the plaintiff intends to proceed, distinct counts should be added for each assault, 1 Saund. 299. n. b. but otherwise it is not necessary, though usual to insert a count for a common assault, for if the plaintiff prove any part of a special count, he will be entitled to a verdict *pro tanto*, though he fail in proving the residue, Rep. temp. Hardw. 121. 2 Saund 74. b. ante, vol. 1. tit. Declaration.

(m) This is the usual form of the count for a common assault, though there have been no battery, see 1 Saund. 14. n. 3. but the words in *italic* should be omitted, where the party was but slightly injured.

(n) Observe the notes to the precedents, ante, 367 to 370. and note (o), ante, 371. This declaration should be framed according to the facts.

kept and continued him the said *AB* so in irons, and imprisoned as aforesaid, for a long space of time, to wit, for the space of ——— hours, then next following. By means, &c. [*state the damage according to the fact, which may be as in the precedent, ante, 372. Add a count for false imprisonment, generally as post, 376, 377. and a count for a common assault as ante, 372.*]

Assault and Battery.

* 374

*[*Observe the commencements and conclusions in the K. B. C. P. or Exchequer, ante, 367 to 370.*] ———, (to wit,) *AB*, and *CD* his wife, complain of *EF*, and *GH* his wife, being in the custody of the marshal of the marshalsea of our lord the now king, before the king himself, of a plea of trespass. For that the said *GH*, on, &c. with force and arms, &c. made an assault upon the said *CD*, then and still being the wife of the said *AB*, to wit, at, &c. and then and there beat, bruised, wounded and ill-treated her, so that her life was then and there greatly despaired of, and other wrongs to the said *CD*(*p*) then and there did, against the peace of our said lord the king, and to the damage of the said *AB*, and *CD*(*q*) his wife, of —. and therefore they bring their suit, &c.

By husband and wife against husband and wife, for a battery of one wife by the other.(*o*)

Pledges.

[*Commencement in King's Bench, Common Pleas, or Exchequer, as ante, 367 to 370.*] For that the said *CD*, on, &c. with force and arms, &c. made an assault on *EF* then, and still be-

By husband alone for the battery of his wife, *per quod*, &c.(*r*)

(*o*) Observe the notes to the precedents, *ante*, 367 to 371. The different trespasses are to be described according to the facts, and may be stated as in the precedent, *ante*, 371. (*c*). Care must be taken to declare only for the personal injury, and sufferings of the wife, and not to include any statement of an injury, which in point of law only affected the husband and not the wife, such as a statement of a battery of the husband, loss of her service, expense in her cure, &c. see 1 Salk 119. Com. Dig. Pleader, A. 1. and *Jackson and Wife v. Manners*, Mich. Term, 26 Geo. III. 21st. MS. 379. and *ante*, vol. 1. 62, 63. However, the statement matters in aggravation will in some cases be aided after verdict. 1 Salk 19.

(*p*) This allegation appears proper, though *alia enormia eis intulit* is good. Cro. Jac. 664. Com. Dig. Pleader, 2 A. 1.

(*q*) *Ad damnum ipsorum* is proper. Com. Dig. Pleader, 2 A. 1. and *ante*, vol. 1. 61.

(*r*) Observe the notes to the precedents, *ante*, 376 to 371. In this declaration no statement of the personal sufferings of the wife should be included, but the plaintiff should proceed merely for the consequential damage, and he may include counts for a battery, or any other trespass to himself, or to his personal or real property, *ante*, vol. 1. 46, 47. 61. See the precedent for *crim. con.* *ante*, 255

*Battery of
servant.*

* 375

ing the wife of the said *A B* to wit, at, &c. and then and there violently beat, kicked, bruised, and *ill-treated^(s) the said *E F* so then and there being the wife of the said *A B* as aforesaid, insomuch that she the said *E F* by means of the premises, then and there became, and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, hitherto, whereby he the said *A B* during all that time lost, and was deprived of all the comfort, benefit and assistance of the said *E F* his said wife, in his domestic affairs, which he might, and otherwise would have had ; but thereby, also he the said *A B* was then and there forced and obliged to pay, lay out, and expend, and hath necessarily paid, laid out, and expended divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of —*l.* in and about the endeavouring to heal and cure the said *E F* his said wife, of the sickness, soreness, lameness and disorder aforesaid, occasioned as aforesaid, to wit, at, &c. aforesaid, and other wrongs to the said *A B* then and there did, against the peace of our said lord the king, and to the damage of the said *A B* of —*l.* and therefore he brings his suit, &c. Pledges, &c.

By a master
for the batte-
ry of his ser-
vant, *per*
quod, &c.^(t)

[*Commencement in K. B. C. P. or Exchequer, as ante, 367 to 370.*] For that the said *C D*, on, &c. with force and arms, &c. made an assault on *F F* then, and s'ill being the daughter and servant of the said *A B*, to wit, at, &c. and then and there beat, bruised, wounded, and ill-treated the said *E F*, insomuch that by means thereof, the said *E F* then and there became, and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto ; during all which time, he the said *A B* lost and was deprived of *the service of his said daughter and servant, and of all the benefit and advantage which might and would otherwise have arisen and accrued to him from such service, to wit, at, &c. aforesaid. [*Conclusion in K. B. C. P. or Exchequer, as ante, 367 to 370.*]

* 376

(s) The trespasses are to be described according to the fact, and may be stated as *ante, 371.*

(t) Observe the notes to the precedents, *ante, 367 to 371.* and to the precedent, *ante, 267.* for debauching a daughter ; a person cannot declare

for the battery of his child, merely in the character of a *parent, ante, vol. 1. 47.* If the plaintiff were put to any expense in medical attendance, &c. state such damage as in the last precedent.

[*Commencement in K. B. C. P. or Exchequer, as ante, 367 to 370.*] For that the said *C D*, on, &c. with force and arms, &c. made an assault upon the said *A B*, to wit, at, &c. and then and there seized and laid hold of the said *A B*, and with great force and violence, pulled and dragged about him the said *A B*, and then and there gave and struck the said *A B* a great many violent blows and strokes, (x) and also then and there forcibly and violently pulled and dragged the said *A B* from and out of a certain dwelling-house, situate and being at, &c. into the public street there, and then and there forced and obliged him to go in and along divers public streets, to a certain police-office, situate and being at, &c. and then and there imprisoned the said *A B* and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for a long space of time, to wit, for the space of — then next following, contrary to the laws and customs of this realm, and against the will of the said *A B*, whereby he the said *A B* was then and there not only greatly hurt, bruised and wounded, but was also thereby then and there greatly exposed and injured in his credit and circumstances, to wit, at, &c. aforesaid. [*It is usual to add the following common count for a false imprisonment, and a count for a common assault as ante, 372. Conclude as ante, 367 to 370.*]

For an assault and compelling plaintiff to go to a police office, and for false imprisonment. (u)

And also, for that the said *C D* on, &c. with force and arms, &c. made another assault upon the said *A B*, to wit, at, &c. and then and there beat, bruised, and ill-treated him the said *A B*, and then and there imprisoned him the said *A B*, and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for a long time, to wit, for the space of — hours then next following; contrary to the laws and customs of this realm, and against the will of the said *A B*; [*add a count for a common assault, as ante, 372. and conclude as ante, 367 to 370.*]

Common count for false imprisonment generally. (y)
* 577

) Observe the notes to the precedent, ante, 371.

) Describe the trespasses according to the facts, which may be as ante, 371.

(y) See the notes to the last precedent, and to the precedent in 1 Saund, 76.

II. TO PERSONAL PROPERTY.

For chasing
sheep, &c.
with special
damage. (z)

[Commencement and conclusion in *K. B. C. P.* or *Exchequer*, as ante, 367 to 370.]—For that the said *C D*, on, &c. and on divers other days and times between that day, and the day of exhibiting this bill, (or if in the *Common Pleas*, “and the commencement of this suit,”) with force and arms, &c. drove, chased and hurried the sheep, ewes and lambs, &c. to wit, — sheep, — ewes and — lambs, of the said *A B*, of great value, to wit, of the value of —*l.* then depasturing, and being in and upon a certain waste, or common, called —, in the parish of —, in the county of —, (a) and then and there chased and drove the said sheep, ewes and lambs, from and off the said common, to divers places to the said *A B* unknown, whereby the said *A B* was not only put to great trouble and expense, amounting in the whole to a large sum of money, to wit, the sum of —*l.* in and about endeavouring to find his said sheep, ewes and lambs, but also divers thereof, to wit, — sheep, — ewes and — lambs, *of great value, to wit, of the value of —*l.* then and there died, and others thereof, to wit, — sheep, — ewes and — lambs, of great value, to wit, of the value of —*l.* then and there became and were wholly lost to the said *A B*, and the residue of the said sheep, ewes and lambs then and there became and were greatly damaged, and lessened in value, to wit, at, &c. aforesaid.

* 378

Second count
for chasing
sheep, or other
cattle. (b)

And also for that the said *C D*, on, &c. with force and arms, &c. chased and drove about other the cattle, to wit, — other sheep, — other ewes and — other lambs, of the said

(z) See the precedents, 9 Wentw. Index, 9. and observe the notes to the precedents, ante, 367 to 370.

(a) This count is local, and will compel the defendant to confine his justification, if any, to chasing from off the particular common. The next count (which is transitory, 1 Saund.

220.) should be added, and in general, is sufficient without the more special count.

(b) See the precedents, 9 Wentw. Index, 9. and observe the notes to the precedents, ante 367 to 370. 1 Saund. 220.

A B, of great value, to wit, of the value of —*l.* to wit, at the parish aforesaid, in the county aforesaid. Whereby the said last-mentioned, sheep, ewes and lambs, being of the value aforesaid, became and were greatly damaged, lessened in value, and spoiled, to wit, at, &c. aforesaid. [State the damage to the cattle according to the fact, and which may be as in the last precedent, and if there be any evidence to support it, add a count de bonis asportatis, as post, 379.]

To cattle, goods, &c.

[Commencement and conclusion in *K. B. C. P.* or *Exchequer*, as ante, 367 to 371.]—For that the said *C D*, on, &c. with force and arms, &c. seized, took and distrained a certain cow (or certain furniture, goods and chattels, to wit, &c.) of him the said *A B*, of great value, to wit, of the value of —*l.* to wit, at, &c. and then and there impounded the said cow, (or furniture, goods and chattels,) and kept and detained the same so there impounded, for a long space of time, to wit, for the space of — days then next following, whereby the said *A B* for and during all that time lost, and was deprived of the use and benefit of his said cow, (or furniture, goods and chattels,) and thereby the same, then and there became and were greatly damaged, lessened in value, and spoiled, to wit, at, &c. aforesaid. [Add a count de bonis asportatis as follows:]

For seizing cattle or other property, as a distress. (c)

* 379

And also, for that the said *C D*, on the — day of —, *A. D.* —, with force and arms, &c. to wit, at the parish of — aforesaid, in the county of — aforesaid, seized, took and drove (or “led,” or if inanimate property, say, “carried away”) a certain cow [or certain goods and chattels, to wit, &c. enumerating them as in trover, ante, 323, 324.] of the said *A B*, of great value, to wit, of the value of —*l.* of lawful money of Great Britain, there then found and being, and converted and disposed of the same to his own use. [Conclude as in *K. B. C. P.* or *Exchequer*, with the alia enormia, &c. as ante, 367 to 370.]

Continues count de bonis asportatis. (d)

(c) See the precedents, 9 Wentw. (d) Observe the notes, ante, 367 to Index, 8, 9. and observe the notes, 371. ante, 367 to 370.

For shooting
a dog, &c. (e)

[*Commencement and conclusion in K. B. C. P. or Exchequer, as ante, 367 to 370.*] For that the said *C D*, on, &c. with force and arms, &c. to wit, at, &c. shot off and discharged a certain gun, then and there loaded with gun-powder, and shot, at and against a certain dog of the said *A B*, of great value, to wit, of the value of —*l.* and thereby and therewith, then and there, so greatly shot, hurt and wounded the said dog, that by reason thereof the said dog, being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, died, to wit, at, &c. aforesaid. [*If the mode in which the defendant injured the dog, &c. be doubtful, add a more general count, as follows:*]

Second count.

And also for that the said *C D*, on, &c. aforesaid, with force and arms, &c. to wit, at, &c. aforesaid, so greatly beat, hurt and wounded a certain other dog of him the said *A B*, of great value, to wit, of the value of —*l.* that by reason thereof the same dog, afterwards, to wit, on the day and year aforesaid, died, to wit, at, &c. aforesaid, and other *wrongs, &c. [*Conclude in K. B. C. P. or Exchequer, as ante, 367 to 370.*]

* 380

For running a
carriage a-
gainst the
plaintiff's,
whereby he
was thrown
out and his
carriage da-
maged, and he
was put to ex-
pense in re-
pairing it, and
in medicines,
&c. (f)

[*Commencement and conclusion in K. B. C. P. or Exchequer, as ante, 367 to 370.*] For that the said *C D*, on, &c. with force and arms, &c. to wit, at, &c. drove a certain carriage, to wit, a curricule, which he the said *C D* was then and there driving, in and along the king's highway, with great force and violence upon and against a certain other carriage, to wit, a certain chaise, of him the said *A B*, of great value, to wit, of the value of —*l.* and in which said chaise he the said *A B* was then riding in and along the said king's highway, and thereby then and there greatly broke to pieces, damaged and spoiled the said chaise of the said *A B*. And by means of the premises, he the said *A B* was then and there cast and thrown with great force and violence from and out of his said chaise, to and upon the ground, and by means of the premises, he the said *A B*

(e) See the precedents, 9 Wentw. Index, 9. 1 Saund. 82. and observe the notes, *ante*, 367 to 370. &c. It may be stated that the defendant *assaulted* the cattle or other animal; but this is not usual, Barnes, 452.

(f) See the precedent, 3 East, 593. Observe the notes to the precedents, *ante*, 367 to 371. and the precedent and notes, *ante*, 281, 282. The injury and the damage should be stated precisely according to the facts.

was afterwards, to wit, on, &c. aforesaid, forced and obliged to, and did necessarily lay out and expend a large sum of money, to wit, the sum of —*l.* in and about the repairing and amending the damage so done to the said chaise as aforesaid, and also by 'means of the premises, he the said *AB* then and there became and was greatly bruised, hurt and wounded, and sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, for the space of — then next following, and during all that time, suffered and underwent great pain, and was hindered and prevented from performing and transacting his lawful affairs and business, by him during that time to be done, performed and transacted; and was also thereby forced and obliged to pay, lay out and expend divers sums of money, in the whole amounting to a large sum of money, *to wit, the sum of —*l.* in and about endeavouring to be cured of the sickness, soreness, lameness and disorder aforesaid, occasioned as aforesaid, to wit, at, &c. aforesaid.

To carriages and ships.

* 381

[*Commencement and Conclusion in K. B. C. P. or Exchequer, as ante, 367 to 370.*] For that the said *CD*, on, &c. with force and arms, &c. to wit, at, &c. stopped and seized a certain horse and cart of the said *AB* of great value, to wit, of the value of —*l.* and kept and detained the same from the said *AB* for a long space of time, to wit, for the space of — then next following, and then and there seized and took from and off the head of the said horse, a certain halter of the said *AB*, of great value, to wit, of the value of —*l.* and then and there carried away the same, and converted and disposed thereof to his own use, to wit, at, &c. aforesaid. [*Add a count de bonis asportatis, as ante, 379. and observe the notes to the precedents, ante, 367 to 371.*]

For seizing and detaining plaintiff's cart and horse, and converting a halter.

[*Commencement and Conclusion in K. B. C. P. or Exchequer, as ante, 367 to 371.*] For that the said *CD*, on, &c. with force and arms, &c. to wit, at, &c. seized and took a certain barge or vessel of the said *AB* of great value, to wit, of the value of —*l.* and in which said barge or vessel, he the said *AB* then

For seizing and detaining plaintiff's barge. (S)

(S) See the precedents, 9 Wentw. 4, 5. and observe the notes, ante, 367 to 371

*To carriages
and ships.*

and there intended, and was about to carry and convey certain goods and merchandise, for certain freight and reward, to be therefore paid to him the said *A B*, and then and there carried away the said barge or vessel, and kept and detained the same from the said *A B* for a long space of time, to wit, hitherto, and converted and disposed thereof to his own use, and thereby the said *A B* was hindered and prevented from carrying and conveying the said goods and merchandise as aforesaid, and thereby lost and was deprived of all the profits, benefit and advantages which might and would otherwise have arisen and accrued to him therefrom, to *wit, at, &c. aforesaid. [*Add a count de bonis asportatis, as ante, 379.*]

* 382

III. TO REAL PROPERTY.

*For trespass
in dwelling-
house, break-
ing open
doors, and
seizing goods
therein. (h)*

[*Commencement and Conclusion in K. B. C. P. or Exchequer, as ante, 367 to 371.*] For that the said *C D*, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, (or if in *C. P.* "*the commencement of this suit,*") with force and arms, &c. broke and entered a certain dwelling-house of the said *A B* situate and being in the parish of —, in the county of —, and then and there made a great noise and disturbance therein, and stayed and continued therein, making such noise and disturbance for a long space of time, to wit, for the space of — days then next following, and then and there forced and broke open, broke to pieces and damaged divers, to wit, — doors of the said *A B*, of and belonging to the said dwelling-house, with the appurtenances, and broke to pieces, damaged and spoiled divers, to wit, — locks, — staples, and — hinges, of and belonging to the said doors respectively, and wherewith the same were then fastened, and of great value, to wit, of the value of —, and also during the time aforesaid, to wit, on the said — day of

(A) See the precedents, 9 Wentw. Index, 15. and the notes to the precedents, *ante*, 367 to 371. The trespasses, and the damage are to be stated according to the facts, and the formal points to be attended to are *ante*, 371. n. (c).

—, seized and took divers goods and chattels, to wit, [describe the goods, &c. as in *trover*, ante, 323, 324.] of the said *A B*, then found and being in the said dwelling-house, and being of great value, to wit, of the value of —*l.* and carried away the same, and converted and disposed thereof to his own use. By means of which said several premises, he the said *A B* and his family were, during all the time aforesaid, not only greatly disturbed and annoyed in the peaceable possession of the said dwelling-house of the said *A B*, but also he the said *A B* was during all that time hindered and prevented from carrying on and transacting therein his lawful and necessary affairs and business, to wit, at, &c. aforesaid. [Add a count for an expulsion, ut infra, if applicable to the facts, and a count de bonis asportatis as ante, 379. as to the use of which, see 1 *T. R.* 479.]

The damage.

* 383

And also for that the said *C D*, on, &c. with force and arms, &c. broke and entered a certain other dwelling-house of the said *A B*, situate, &c. and then and there ejected, expelled, put out and amoved the said *A B* and his family from the possession, use, occupation and enjoyment of the said dwelling-house, and kept and continued them so ejected, expelled, put out and amoved, for a long space of time, to wit, from thence hitherto. Whereby the said *A B* for and during all that time lost, and was deprived of the use and benefit of his said dwelling-house, to wit, at, &c. aforesaid.

Count for a common expulsion.

Commencement and conclusion in K. B. C. P. or Exchequer, ante, 367 to 371. For that after the making of a certain act of parliament, at a parliament holden at *Westminster*, in the county of *Middlesex*, in the reign of *Henry VI.* late king of *England*, entitled, "the duty of justices of peace where land is entered upon or detained with force," and at the time of the committing of the grievances by the said *C D* as hereinafter next mentioned, the said *A B* was seised (that is to say) in his demesne as of fee, of and in a certain dwelling-house, [or close, according to the fact,] with the appurtenances, situate, &c. and the said *A B* being so seised thereof, the said

On the stat. 8 Hen. VI. c. 9. for a forcible entry and detainer. (i)

(i) See the precedents, 9 *Wentw. Index*, 24 *Co. Ent.* 46. a

To houses,
&c.

* 384

C D not regarding the said statute heretofore, and after making of the said statute, and whilst the said *A B* was so seised, to wit, on, &c. *with force and arms, &c. broke and entered the said messuage (or "*close*," &c.) of the said *A B* and then and there in a forcible manner put out, and disseised the said *A B* thereof, and in a forcible manner, and with strong hand kept and continued the said *A B* so put out and disseised for a long space of time, to wit, thence hitherto, and, &c. [*Here several trespasses on the land at common law were stated, but it was thought they ought to be omitted on the ground that treble damages cannot be given under the statute for any damage subsequent to the forcible entry; a third count, however, was added, to enable the plaintiff to try that point. It was also thought that the action for a forcible entry can only be supported by a freeholder.*] By means whereof, the said *A B* for and during the time aforesaid, lost and was deprived of the profits, benefit and advantages which might and otherwise would have arisen and accrued to him from the possession, use, occupation and enjoyment of his said messuage to wit, at, &c. aforesaid. And other wrongs to the said *A B* then and there did, in contempt of, and against the peace of our said lord the king, and to the great damage of the said *A B*, and against the form of the statute in such case made and provided.

Second count,
on plaintiff's
possession as
tenant from
year to year.

* 385

And also, for that after the making the said act of parliament, and at the time of the committing of the grievances by the said *C D*, as in this count mentioned, the said *A B* was lawfully possessed of a certain other messuage, (or "*close*,") situate, &c. as tenant thereof to one *E F* for so long a time as they the said *A B* and *E F* should respectively please, and the said *A B* being so possessed of the said last-mentioned messuage as aforesaid, the said *C D*, not regarding the statute in such case made and provided, heretofore, to wit, on, &c. aforesaid, with force and arms, &c. broke and entered the said last-mentioned messuage (or "*close*") of the said *A B* and then and there in a forcible manner put out and dispossessed the said *A B* thereof, and in a forcible *manner, and with strong hand kept and continued the said *A B*, so put out and dispossessed for a long space of time, to wit, thence hitherto. By means, &c. [*as in the first count to the end.*]

And also, for that the said *C D* after the making of the said Third count on possession generally. (k) act of parliament, to wit, on, &c. aforesaid, with force and arms, &c. and with strong hand, and against the form of the statute in such case made and provided, broke and entered a certain other messuage (or "*close*,") of the said *A B*, situate, &c. and then and there in a forcible manner put out, disseised, dispossessed, and expelled the said *A B* therefrom, and in a forcible manner, and with strong hand kept and continued him the said *A B* so put out, disseised, dispossessed, and expelled therefrom for a long space of time, to wit, thence hitherto. By means, &c. [as in the first count to the end. Add a count for trespasses at common law, and for a common expulsion, as ante, 367 to 370.]

[Commencement and conclusion in *K. B. C. P.* or *Exchequer*, as ante, 367 to 370.] For that the said *C D*, on, &c. and on divers other days and times between that day and the day of exhibiting this bill, (or if in *C. P.* "*before the commencement of this suit*,") with force and arms, &c. broke and entered divers, to wit, — closes of the said *A B* situate, lying and being in the parish of —, in the county of —, (m) and then and there forced and broke open, broke to pieces, damaged and spoiled divers, to wit, — gates of the said *A B* of great value, to wit, of the value of —*l.* then standing and being in the said close, and the locks, *staples, and hinges, to wit, — locks — staples, and — hinges, of the said *A B*, of great value, to wit, of the value of —*l.* respectively affixed to the said gates, and with which the same were then respectively locked and fastened, and with feet in walking trod down, trampled upon, consumed and spoiled the grass and corn of the said *A B*, of great value, to wit, of the value of —*l.* there then growing and being, and with cattle, to wit, horses, mares, geldings, cows, oxen and sheep, eat up and depastured the grass and corn of the said *A B*, of great value, to wit, of the value of —*l.*

For trespass in closes, breaking open gates and locks, with cattle eating grass, &c. and with carts, damaging grass, and subverting soil, cutting down and carrying away hay and corn, cutting down trees and carrying away the wood, damaging hedges, and filling up ditches, and incumbering the closes with buildings, &c.

(i) * 386

(k) See the precedent, Co. Ent. 46. a.

(l) Observe the notes to the precedents, ante, 367 to 371. and the precedents, 9 Wentw. Index, 15. &c. The trespasses are always to be de-

scribed according to the fact, and in the order in which they occurred.

(m) It is in general advisable to set out the abutments, or names of the closes, when they can be ascertained with certainty. See the next precedent.

To Land, &c. then growing and being in the said closes, and with divers other horses, mares, geldings, sheep and cattle, and also with the wheels of divers carts, waggons and other carriages crushed, damaged and spoiled other the grass and corn of the said *A B*, of great value, to wit, of the value of —*l.* there then also growing and being, and with the feet of the said horses, mares and geldings, and with the wheels of the said carts, waggons and other carriages, tore up, subverted, damaged and spoiled the earth and soil of the said closes; and also then and there mowed and cut down the grass and corn of the said *A B* then growing in the said closes, and then and there seized, took and carried away the hay and corn, to wit, — cart-loads of hay, and — cart-loads of corn of the said *A B*, of great value, to wit, of the value of —*l.* off and from the said closes, and converted and disposed thereof to his own use; and also then and there cut down, prostrated and destroyed the trees and underwood, to wit, — oaks, — ash trees, — elms, &c. (*according to the fact,*) and other trees, and — acres of the underwood of the said *A B*, of great value, to wit, of the value of —*l.* and the timber, wood, branches, and bushes thereof, coming and arising, to wit, — loads of timber, — cart-loads of wood, — cart-loads of branches, and — cart-loads of bushes, of the said *A B* of great value, to wit, of the value of —*l.* took and carried away, and converted and disposed thereof to his own use; and also then and there broke down, *prostrated, and destroyed a great part, to wit, — perches of the hedges, and — perches of the fences of the said *A B* of and belonging to the said closes respectively, and also then and there cast and threw divers large quantities of earth, stones and rubbish into divers, to wit, — ditches of the said *A B*, of and belonging to the said closes respectively, and thereby and therewith then and there choked and filled up the same; and also then and there put, placed and erected, and caused to be put, placed and erected, divers, to wit, — shambles, — stalls, — booths, and — tables, in and upon the said closes, and kept and continued the said shambles, stalls, booths, and tables so there put, placed and erected without the leave or license, and against the will of the said *A B*, for a long space of time, to wit, from the said — day of —, in the year aforesaid hitherto; and thereby and there-

with, during all the time aforesaid, greatly encumbered the said closes respectively, and hindered and prevented the said *A B* from having the use, benefit and enjoyment thereof, in so large and ample a manner as he might and otherwise would have done, to wit, at, &c. aforesaid. [*Where there has been an expulsion, a count should be added as ante, 383. and where there has been a removal of property severed from the realty, a count de bonis asportatis, should be added as ante, 379.*]

For that the said *C D* on, &c. and on divers other days and times between that day, and the day of exhibiting this bill, (or in *C. P.* "*before the commencement of this suit*") with force and arms, &c. broke and entered a certain close of the said *A B* called —, situate and being in the parish of —, in the county of —, [*or if it be described by abutments, omit the name of the close, and state *the abutments according to the facts, and which may be as follows :*] abutting towards the east, on a certain close in the possession of *E F*; towards the west on a field called —; towards the north, on, &c. and towards the south, on, &c. and then and there, &c. [*describe the trespasses according to the facts, which may be as in the last precedent.*]

The like, setting out the name of the close or its abutments.(n)

* 388

[*Commencement and conclusion in K. B. C. P. or Exchequer, as ante, 367 to 370.*] For that the said *C D*, on, &c. and on divers other days and times, between that day and the day of exhibiting this bill, with force and arms, &c. to wit, at, &c. felled, cut down, prostrated and destroyed the trees and pollards, to wit, — oaks, — ash trees, — elms, — other trees, and — pollards of the said *A B*, of great value, to wit, of the value of —. then growing and being in and upon certain lands there situate, and took and carried away the same, and

For cutting down and carrying away trees.(o)

(n) In order to avoid the necessity for a new assignment, in case the defendant should plead *liberum tenementum*, it is frequently advisable to state the name of the close, or its abutments, see 1 Saund. 290. a. b. c. 2 Bl. Rep. 1089. *Ante*, vol. 1. Index, tit. Abutments; but in this case care must be taken that the description correspond precisely with the facts,

for otherwise the plaintiff may be nonsuited on this count, 1 T. R. 479.

(o) It is usual, where the facts will support the allegation, to declare as well for the trespass on the close, as for cutting down the trees, but where the land has been demised, but the trees excepted in the lease, the above count is most proper. 1 Saund. 322 n. 5. 7 T. R. 13.

To land, &c. converted and disposed thereof to his own use, [add a count for carrying away trees generally as ante, 379.]

Declaration in trespass for meane profits, after a recovery in ejectment.(p)

* 389

Damage.(r)

[Commencement and conclusion in *K. B. C. P.* or *Exchequer*, as ante, 367 to 370.] For that the said *C D*, heretofore, to wit, on, &c.(q) with force and arms, &c. broke and entered — messuages, &c. [the premises are to be described as in the declaration in ejectment in which judgment *was obtained] situate and being in the parish of —, in the county of —, and ejected, expelled, put out, and amoved the said *A B* from his possession and occupation thereof, and kept and continued him so expelled and amoved for a long space of time, to wit, from the day and year aforesaid, until and upon, &c. (the day on which possession was obtained,) and during that time took and had and received to the use of him the said *C D*, all the issues and profits of the said tenements, being of great yearly value, to wit, of the yearly value of —*l.* Whereby the said *A B*, during all the time aforesaid, not only lost the issues and profits of the said tenements, with the appurtenances, but was deprived of the use and means of cultivating the same, and was forced and obliged to, and did necessarily lay out and expend divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of —*l.* in and about the recovering of the possession of the said tenements, with the appurtenances, to wit, at, &c. aforesaid.

(p) See the precedents in *Runn. Eject.* 535, 536. 2 *Rich. C. P.* 440. This action may be in the name of the nominal plaintiff, or of the lessor of the plaintiff; if there were several demises, and the party interested had no right of possession anterior to the day of the demise in the ejectment, it is frequently most advisable to proceed in the name of the former; but otherwise in that of the latter, in order to recover anterior meane profits. As to this action in general, see *Runn. Eject.* 438 to 445. and ante, vol. 1. Index, tit. *Mesne Profits*.

(q) This is usually the day of the ouster laid in the declaration in eject-

ment, but where the plaintiff's right of possession and the defendant's unlawful entry were anterior to that time, it is advisable to state the time according to the fact.

(r) In this action the plaintiff may recover in damages the value of the occupation of the premises, together with the costs of the action of ejectment, and if any particular damage, waste, or injury to the premises were committed by the defendant, it should be stated specially, and such statement may be as in the precedent, ante, 385, 386.

And other wrongs, &c. [*Conclusion in K. B. C. P. or Ex. To land, &c. cheque, as ante, 367 to 370.*]

[*Commencement and conclusion in K. B. C. P. or Exchequer as ante, 367 to 370.*] For that the said *C D*, (being at the several times in this count mentioned, a dissolute person, and not an apprentice in company with his master, duly qualified by law so to do) on, &c. and on divers other days and times between that day, and the day of exhibiting this bill, (or in *C. P.* "*the commencement of this suit,*") with force and arms, &c. broke and entered a certain close, or piece or parcel of land called —, of the said *A B*, situate, lying and being in the parish of —, in the county of —, and then and there hunted in, upon, and over the said close or piece or parcel of land, and then and there with feet in walking, and with divers dogs, trod down, consumed, and spoiled the grass and herbage of the said *A B*, of great value, to wit, of the value of —. there then growing and being; and also then and there broke down, pulled down, pulled to pieces, prostrated and destroyed the hedges and fences, to wit, — perches of the hedges, and — perches of the fences of the said *A B*, of great value, to wit, of the value of —. there then erected, standing, and being, contrary to the form of the statute in that case made and provided.⁽¹⁾ And also for that the said *C D*, on the said — day of —, and *A. D.* —, and on divers other days between that day and the day of exhibiting this bill, with force and arms, &c. broke and entered divers, to wit, — other closes of the said *A B*, situate and being in, &c. aforesaid, and then and there with feet in walking, and with the feet of divers dogs, trod down, trampled upon, crushed, and spoiled the grass and corn

Trespass against an inferior tradesman, for hunting, &c. on 4 and 5 W. & M. c. 23. s. 10. (s) *

* 390

Second count for breaking close and killing game, at common law.

(s) The use of declaring specially on the statute, is to entitle the plaintiff to full costs, see the precedent and opinion, 9 Wentw. 157, 158. Hullock on Costs, 90 to 103. It is not necessary to negative the qualifications, 1 Ld. Raym. 149. 2 Wils. 70. 3 Bl Com. 215. or to conclude *contra formam statuti*, 1 Ld. Raym. 150. Hullock, 92. It is advisable to

add a count for the trespass at common law, though upon the special count, the plaintiff may recover as for a common trespass, if he fail in proving the circumstances, which bring the case within the statute.

(t) The conclusion *contra formam statuti* is not necessary, *supra*, note (s).

*For fishing,
&c.*

of the said *A B*, then growing and being in the said closes, and then and there being of great value. to wit, of the value of —*l.* and then and there with the said dogs, and with guns, hunted and searched in the said closes, for hares, pheasants, partridges and other game, and killed, seized, took, and carried away from and off the said closes, divers, to wit. — hares, — pheasants, — partridges, and — conies of the said *A B*,(u) of great value, to wit, of the value of —*l.* then being in and upon the said *closes, and converted and disposed thereof to his own use. And also for that the said *C D* on, &c. aforesaid, with force and arms, &c. to wit, at, &c. aforesaid, killed, seized, took, and carried away divers, to wit, — other hares, — other pheasants, — other partridges, and — other conies, of the said *A B*, of great value, to wit, of the value of —*l.* and converted and disposed thereof to his own use. And other wrongs, &c. [*conclusion in K. B. C. P. or Exchequer, as ante, 367 to 370.*]

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Third count
for carrying
away game.

First count for
fishing in
plaintiff's
close covered
with water.
(x)

[*Commencement in K. B. C. P. or Exchequer, as ante, 367 to 370. the venue is local.*]—For that the said *C. D.* on, &c. and on divers other days and times, between that day and the day of exhibiting this bill, with force and arms, &c. broke and entered the close of the said *A B*, covered with water,(y) situate and being in the parish of —, in the county of —, and then and there fished in the said close for fish, and the fish, to wit,(z) — salmon, — trout, — pike, — carp, — tench, — perch, — roach, and — eels, of the said *A B*,(a) of great value, to wit, of the value of —*l.* there then

(u) This is sufficient, though game may be *feræ naturæ*, the plaintiff by reason of his possession of the land having a local property therein, *Ld. Raym.* 250. and the same rule prevails as to fish taken in a several fishery. *Cro. Car.* 553, 554.

(x) See the precedents, 9 *Wentw. Index*, 24. As to the law, see *Com. Dig. Piscary*. *Co. Lit.* 122. a. n. 7. 2 *Bl. Com.* 89. 2 *Salk.* 637. 4 *T. R.* 437. As the owner of the soil is *prima facie* entitled to the fishery therein, it

is frequently advisable to insert this count, *Co. Lit.* 126. b. n. 1.

(y) This is the mode of describing the right to a pond, &c. where the plaintiff is entitled to the land under the water. *Co. Lit.* 4. b. *Yelv.* 143.

(z) Insert a sufficient number of each description of fish, that may probably have been taken.

(a) As to the allegation of the property in the fish, *ante*, 390. n. (u). and *Cro. Car.* 553.

found and being, caught, took, and carried away the same, and converted and disposed thereof to his own use. *For fishing, &c.*

And whereas also, the said *C D*, on, &c. and on divers other days and times, between that day and the day of exhibiting this bill, with force and arms, &c. broke and entered the several fishery, of the said *A B*, in a certain river called —, situate and being in the parish of —, in the county of —, and then and there fished in the said fishery for fish, and the fish, to wit, &c. (*enumerate as in the last precedent*.) of the said *A B*, there then found and being, of great value, to wit, of the value of —*l.* caught, took and carried away, and converted and disposed thereof to his own use. *Second count for fishing in plaintiff's several fishery.*

* 392

And also for that the said *C D*, on, &c. and on divers other days and times, between that day and the day of exhibiting this bill, with force and arms, &c. in the free fishery of the said *A B*, in the parish aforesaid, in the county aforesaid, fished, and the fish, to wit, &c. (*as in the precedent, ante*, 391.) there then found and being, of great value, to wit, of the value of —*l.* caught, took and carried away, and converted and disposed thereof to his own use. *Third count for fishing in plaintiff's free fishery. (b)*

And also for that the said *C D*, on, &c. aforesaid, and on divers other days and times, between that day and the day of exhibiting this bill, with force and arms, &c. to wit, at, &c. aforesaid, caught, took, and carried away other the fish, to wit, &c. (*as in the precedent, ante*, 391.) of the said *A B*, there then found and being, of great value, to wit, of the value of —*l.* and converted and disposed thereof to his own use, to wit, at, &c. aforesaid, [*conclusion in K. B. C. P. or Exchequer, as ante*, 367 to 370.] *Fourth count for catching plaintiff's fish generally.*

For that the said *C D*, being at the several times in this count mentioned, a dissolute person, and not an apprentice in

(b) It is doubtful whether trespass lies for fishing in a free fishery, and therefore a verdict should not be taken unnecessarily on this count. *Co. Lit.* 127. b. notes to 122. a. n. 7. *Bl. Com.* 39. 2 *Salk.* 687. *F. N. B.* 88.

(c) See the precedent, 9 *Wentw.* 157. where the facts will support this count, it is advisable to insert it in order to recover full costs, see *ante*, 389. note (a). Other counts at common law, as above should be inserted.

Against an inferior tradesman, on stat. 4 and 5 W. & M. c. 28. s. 10. for fishing in plaintiff's several fishery. (c)

*For fishing,
&c.*

company with his master, duly qualified by *law so to do, on, &c. and on divers other days and times, between that day and the day of exhibiting this bill, (or in *Common Pleas*, the "*commencement of this suit*,"") with force and arms, &c. broke and entered a certain close, or piece or parcel of land, called —, of the said *A B*, situate, lying, and being in the parish of —, in the county of —, and then and there fished in the several fishery of *A B* there without the leave or license, and against the will of the said *A B*, and contrary to the form of the statute in that case made and provided, and the fish of the said *A B*, to wit, &c. [*enumerate the fish as in the precedent, ante, 391.*] of great value, to wit, of the value of —*l.* there then found and being, took and carried away, and converted and disposed thereof to his own use, to wit, at, &c. aforesaid.—[*Add other counts as above.*]

In the King's Bench, (or "Common Pleas,")

Michaelmas(b) Term, 48 Geo. III

Declaration by
original in K.
B. or C. P. on
a single de-
mise. (a)

—, (c) (to wit.) Richard Roe(d) was attached to answer John Doe(d) of a plea, wherefore he the said Richard Roe,

(a) It is most usual to proceed in ejectment in K. B. by declaration on a supposed *original writ*.

(b) Though we have seen that in general a declaration must not be intituled of a term anterior to the cause of action, (*ante*, 1. n. (a),) yet in ejectment it is otherwise, and the demise and ouster are frequently laid after the term of which the declaration against the casual ejector is intituled, and no objection can be taken, because the nominal defendant cannot demur, and the real defendant, if he appear, must by the terms of the consent rule, accept a declaration against

himself of the subsequent term, and plead only the general issue.

(c) The venue is local, and even after verdict, if the venue were laid in a wrong county, it would be doubtful whether the plaintiff could obtain possession, 7 T. R. 588.

(d) Any names may be adopted for these nominal parties, but the common names, John Doe for the supposed plaintiff, and Richard Roe for the casual ejector are preferable. Though usual, it is not necessary to insert the supposed addition of the defendant, the stat. 1. Hen. V. c. 5. not extending to declarations, 3 Bos. & Pall. 599.

with force and arms, &c. entered into [here follows the statement of the premises, for the recovery of which the action is brought. The pleader will select such parts of the following description, as may be applicable to his case, inserting a sufficient number of houses, acres, &c. to cover the real quantity, and will take care not to adopt the term "tenement," (c)] the manor of —, in the county of —, with the rights, members, and appurtenances thereunto *belonging; and also into the rectory of the parish church of —, in the county aforesaid, and also all and singular the tithes of corn, grain, hay, wood, grass, wool, lambs, and calves, arising, growing, renewing, increasing and happening, within the said parish of —, and with the bounds, limits, and titheable places of the said rectory; — and also into — messuages, — cottages, — barns, — stables, — coach-houses, — outhouses, — yards, — gardens, — orchards, — acres of arable land, — acres of meadow land, — acres of pasture land, — acres of wood land, — acres of land covered with water, and — acres of other land, with the appurtenances, situate and being in the parish† of — aforesaid, in the county of — aforesaid, with common of pasture thereunto belonging and appertaining, (h) which AB(i) had demised to the said John

On a single demise.

A manor. (f)

* 395

A rectory and tithe. (g)

Messuages, buildings, land and common of pasture.

The supposed demise by the lessor of the plaintiff.

(c) For what an ejectment will lie, and what is a sufficient description, see Runn. Ejectment, 121 to 136. Selwyn's N. P. 622 to 624. The term "tenement" is improper, because ejectment in general lies only for corporeal hereditaments, and the term "tenement" includes incorporeal estates, 2 Bl. Com. 17. and an ejectment for a messuage and tenement was holden bad after verdict, 1 East, 441. 2 Stra. 891. Sed vide 2 Saund. 44. n. 3.

(f) Ejectment lies for a manor generally, Latch. 61. Lit. Rep. 301. Runn. Eject. 129.

(g) Ejectment lies for tithe, see Runn. Ejectment, 133 to 136. As to the description, see Bull. N. P. 99.

† If the tenements lie in different parishes, it has been usual to enumerate the whole as lying in one parish,

and to repeat the description of the tenements as lying in the other parish, but it seems sufficient to describe the whole as lying "in the parishes of — and —," see Cro. Eliz. 465. 3 Lev. 334. 1 Burr. 623. 5 Burr. 2673.

(h) Ejectment lies for common appurtenant, when claimed together with the land to which it belongs, Stra. 54. Runn. Ejectment, 131.

(i) This is to be the person who is the real plaintiff, and who had the legal estate, and right of possession at the time of the supposed demise, 7 T. R. 47. and if there be any doubt in whom the legal right of possession was vested, or if parties interested be tenants in common, several counts on the several demises of the different persons should be inserted as in the following precedents.

On a single demise. Doe, for a term which is not yet expired, and ejected him from his said farm ;(k) and other wrongs to the said John Doe, there did, to the great damage of the said John Doe, and against the peace of our lord the now king, &c.—And thereupon the *said John Doe, by *E F* his attorney complains, that whereas the said *A B*,(m) on the — day of —,(n) in the — year of the reign of our said lord the king, at the parish aforesaid, in the county aforesaid, had demised the said tenements,(o) with the appurtenances to the said John Doe, to have, and to hold the same to the said John Doe, and his assigns, from the — day of —,(p) in the — year aforesaid, for, and during, and unto the full end and term of —(q) years, from thence next ensuing, and fully to be completed and ended.—By virtue of which said demise, the said John Doe entered into the said tenements, with the appurtenances, and became and was thereof possessed, for the said term, so to him thereof granted, as aforesaid. And the said John Doe, being so thereof possessed, the said Richard Roe, afterwards, to wit, on the — day of —,(r) in the — year aforesaid, with force and arms, &c. entered into the said tenements, with the appurtenances, in which the said John Doe was so interested, in manner, and for the term aforesaid, which is not

Count part.(l)
* 396

Plaintiff's entry.

The ouster.

(k) The term *farm* here signifies the *leasehold estate* in the premises, and does not mean a *farm* in its common acceptation ; it is therefore applicable to houses as well as land, 2 Bl. Com. 318.

(l) The count part, as in trespass, in C. P. *ante*, 369. is an amplification of the writ.

(m) The lessor of the plaintiff as *ante*, 395. note (i).

(n) Care must be taken to insert some day after the lessor's right of entry commenced, 2 East, 257. 5 East, 132. *ante*, vol. 1. tit. Declaration. If the right of possession accrued a considerable time before the commencement of the action, it is usual to insert two sets of counts, The 1st on a demise immediately after the right of possession accrued, and an ouster immediately following,

and the 2d upon a demise just before the commencement of the action and another ouster, see the precedent, *post*, 399, 400.

(o) The words "said tenements" having reference to the anterior specification, are *here* sufficient.

(p) This is usually the day before that of the demise.

(q) It is usual to insert *seven years* if the demise be recent, but a sufficient number of years should be inserted, so as certainly to extend beyond the time when final judgment may be obtained, Skin. 161. Runn. Ejectment, 227. 451. 3 T. R. 13.

(r) The ejectment or ouster should be stated to have been after the commencement of the supposed demise, and it is usual, though not necessary, to mention a particular day, Cro. Jac. 311.

expired, and ejected him the said John Doe, out of his said farm, and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of our said lord the king; wherefore the said John Doe saith that he is injured, and hath sustained damage to the value of 50*l.* and therefore he brings his suit, &c.—*(At the foot of the declaration, a notice to appear must be subscribed as follows.)*

On a single demise.

* 397

Mr. C D, [*The tenant in actual possession.*]

I am informed that you are in possession of, or claim title to, the premises in this declaration of ejectment mentioned, or to some part thereof, and I being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear in next — term, (or if the premises lie in *London or Middlesex*, "*on the first day of next term,*") (s) in his majesty's court of king's bench, wheresoever, &c. (or in the common pleas, "*in his majesty's court of common bench at Westminster,*") by some attorney of that court, and then and there, by rule of the same court, to cause yourself to be made defendant in my stead, otherwise I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession.—Dated this — day of —, A. D. —.

Notice to appear thereto.

yours, &c.

Richard Roe.(t)

In King's Bench, (or "Common Pleas.")

Michaelmas Term, 48 Geo. III.

On double demises.

—, (to wit.) Richard Roe was attached to answer John Doe of a plea, wherefore, he the said Richard Roe, with

The like on two demises with one counter.

* 398

(s) In a country cause the notice should be to appear generally in the ensuing term, but in *London or Middlesex* on the first day of the term, (meaning the first day in *full term*), Selwyn's N. P. 640.

notice was signed in the name of John Doe the nominal plaintiff, the court refused to set aside the judgment. 2 T. R. 351.

(t) Strictly this should be the name of the casual ejector, but where the

(u) When to insert two demises, see *ante*, 395. note (i), 396. note (n) Most of the notes to the last precedent are here also applicable.

* On double demises.

Writ part, 1st demise.

force and arms, &c. entered into, &c. (*enumerate the premises according to the fact, and as ante, 395.*) with the appurtenances, situate and being in the parish of —, in the county of —, which *A B* had demised to the said John Doe, for a term which is not yet expired, and ejected him from his said

Writ part, 2d demise.

farm.—And also, wherefore the said Richard Roe, with force and arms, &c. entered into — other messuages, &c. (*enumerate the premises as above, inserting the word "other messuage," &c.*) with the appurtenances, situate and being in the parish aforesaid, in the county aforesaid, which *G H* had demised to the said John Doe, for a term which is not yet expired, and ejected him from his said last-mentioned farm; and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against the peace of our lord the now king. And thereupon the said John Doe, by —

Count part, 1st demise.

his attorney complains: That whereas the said *A B*, on the — day of —, in the — year of the reign of our said lord the king, at the parish aforesaid, in the county aforesaid, had demised to the said John Doe, the said tenements with the appurtenances *first* above mentioned, to have and to hold the same to the said John Doe, and his assigns, from the — day of —, in the — year aforesaid, for and during, and unto the full end and term of — years, from thence next ensuing, and fully to be complete and ended.—And also, that whereas the said

2d demise.

G H, on the said — day of —, in the — year aforesaid, at the parish aforesaid, in the county aforesaid, had demised to the said John Doe, the said tenements with the appurtenances, *secondly* above mentioned, to have and to hold the same to the said John Doe, and his assigns, from the said — day of —, in the — year aforesaid, for and during, and unto the full end and term of — years, from thence next ensuing, and fully to be complete and ended. By virtue of which said *several demises*,

* 399

Plaintiff's entry.

the said John Doe entered into the said *several* tenements, first and secondly above mentioned, with the appurtenances, and became and was possessed thereof for the said several terms, so to him thereof respectively granted as aforesaid. And the said John Doe being so thereof possessed, the said Richard Roe, afterwards, to wit, on the — day of —, in the — year aforesaid, with force and arms, &c. entered into the said tenements, with the appurtenances, first and secondly above men-

The ouster.

DECLARATIONS IN EJECTMENT.

399

tioned, in which the said John Doe was so interested, in manner and for the several terms aforesaid, which are not yet expired; and ejected the said John Doe from his said several farms, and other wrongs, &c. [as in the precedent, ante, 396. from the † and with the like notice to appear.]

On double demises.

In the King's Bench, (or "Common Pleas.")

Michaelmas Term, 48 Geo. III.

—, (to wit.) Richard Roe was attached to answer John Doe of a plea, wherefore the said Richard Roe with force and arms, &c. entered into — messuages, &c. [enumerate the tenements according to the fact, and as ante, 395.] with the appurtenances, situate and being in the parish of —, in the county of —, which *A B* — had demised to the said John Doe, for a term which is not yet expired, and ejected him from his said farm. And also, wherefore the said Richard Roe, with force and arms, &c. entered into — other messuages, &c. [enumerate as in the first count, inserting the words "other messuage," &c.] *with the appurtenances, situate and being in the parish aforesaid, in the county aforesaid, which the said *A B* had demised to the said John Doe for a term which is not yet expired, and ejected him from his said last-mentioned farm; and other wrongs, to the said John Doe, then and there did, to the great damage of the said John Doe, and against the peace of our lord the now king, &c. And thereupon the said John Doe, by — his attorney complains: that whereas the said *A B*, on the — day of —, (y) in the — year of the reign of our said lord the king, at the parish aforesaid, in the county aforesaid, had demised to the said John Doe, the said tenements with the appurtenances, first above mentioned, to have

The like on two demises with two ousters. (u)

2d demise. (x)

* 400

Count part, 1st demise.

(u) As to the use of this declaration, see ante, 396. note (n); most of the notes to the precedent, ante, 394 to 397. are here also applicable.

(x) Though in the count parts the demises are laid at different times, with an intervening ouster, yet as no

time is stated in the writ parts, therefore, however numerous the demises may be, they follow each other, without any statement of an intermediate ouster, &c.

(y) Some day immediately after the right of possession first accrued.

On double demises.

1st entry and ouster.

2d demise.

* 401

Second ouster.

and to hold the same to the said John Doe and his assigns, from the — day of —, in the — year aforesaid, for and during, and unto the full end and term of — years, from thence next ensuing, and fully to be complete and ended. By virtue of which said last mentioned demise, the said John Doe entered into the said tenements, with the appurtenances first above mentioned, and became and was thereof possessed, for the said term, so to him thereof granted as aforesaid, and the said John Doe, being so thereof possessed, the said Richard Roe, afterwards, to wit, on the — day of —, in the — year aforesaid, with force and arms, &c. entered into the said tenements, with the appurtenances first above mentioned, in which the said John Doe was so interested, in manner and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm. And also, that whereas the said A B, on the said — day of —, in the — year aforesaid, at the parish aforesaid, in the county aforesaid, had demised to the said John Doe, the said tenements, with the appurtenances, secondly above mentioned, to have and to hold the same to the said John Doe, and his assigns, from the — day of —, in the — year aforesaid, for, and during, and unto the full end and term of — years, from thence next ensuing, and fully to be complete and ended. By virtue of which said last-mentioned demise, the said John Doe entered into the said tenements with the appurtenances secondly above mentioned, and became and was thereof possessed for the said last-mentioned term, so to him thereof granted as aforesaid, and the said John Doe being so thereof possessed, the said Richard Roe, afterwards, to wit, on the — day of —, in the — year aforesaid, with force and arms, &c. entered into the said tenements with the appurtenances secondly above mentioned, in which the said John Doe was so interested, in manner and for the term last aforesaid, which is not yet expired, and ejected the said John Doe from his said last-mentioned farm, and other wrongs, &c. *as in the precedent, ante, 396, 397. to the end, and with the like notice to appear.]*

The like on demises by tenants in common, &c.

If there be several persons entitled to the possession, the demise or demises, stated in the declaration, must be joint or several as their title will warrant. If the lessors of the plain-

iff be joint-tenants or parceners, the declaration must allege a joint demise; if tenants in common, a several demise by each of their undivided shares as below. In the latter case, the declaration should contain as many counts as there are tenants in common lessors of the plaintiff. But tenants in common, may join in a lease to a third person, and then the declaration may state a demise by such lessee, *Selwyn's N. P.* 637, 638. *Bull. N. P.* 107. *Cro. Jac.* 166. 2 *Wils.* 232. If the ejectment be brought by a corporation aggregate, by an infant, or for tithes, formerly it was considered necessary to state that the demise was by deed, *Carth.* 390. *Cro. Jac.* 613. but now this is considered unnecessary, see *Ld. Raym.* 136. *Sel. Prac.* 2d edit. c. 14. sec. 2. A. and sec. 3. D. The demise by tenants in common, of an undivided share is the same as the precedent, *ante*, 397 to 399. Inserting at the † the following words "one undivided moiety or half part, the whole into two equal moieties to be divided," and adding a count as in the last precedent, on the demise of the other tenant in common, inserting the same words. However, under a count for an entirety, or for a moiety, an undivided third may be recovered, 1 *Burr.* 326. 3 *Lev.* 334. 1 *Sid.* 229.

* 402

Markham and Le Blanc.

Michaelmas Term, 48 Geo. III.

—, (to wit.) John Doe complains of Richard Roe, being in the custody of the marshal of the marshalsea, of our lord the now king, before the king himself; for that whereas *AB* on the — day of —, in the — year of the reign of our said lord the king, at the parish of —, in the county of —, had demised to the said John Doe, — messuages, &c. [enumerate as *ante*, 394, 395.] with the appurtenances, situate and being in the parish aforesaid, in the county aforesaid, to have and to hold the same, to the said John Doe, and his assigns,

Declaration
by bill in
B.(z)

(z) It is not usual to proceed in the precedent, *ante*, 394 to 397. are K. B. by bill. Many of the notes to also here applicable.

DECLARATIONS IN EJECTMENT.

By bill.

Plaintiff's entry and the ouster.

* 403

from the — day of — in the — year aforesaid, for, and during, and unto the full end and term of — years, from thence next ensuing, and fully to be complete and ended. (a) By virtue of which said demise, the said John Doe entered into the said tenements with the appurtenances, and became and was possessed thereof for the said term, so to him thereof granted; and the said John Doe being so thereof possessed, the said Richard Roe, afterwards, to wit, on the — day of —, in the — year aforesaid, with force and arms, &c. entered into the said tenements with the appurtenances, in which the said John Doe was so interested in manner and for the term aforesaid, which is not yet expired, and ejected the said John Doe from his said farm, † and other wrongs to the said John Doe, then and there did against the peace of our said lord the king, and to the damage of the said John Doe, of 50l. and therefore he brings his suit, &c.

Pledges to prosecute,

} JOHN DEN
and
RICHARD FENN.

Notice to appear.

[The notice to appear is to be precisely as ante, 397. omitting the words "wheresoever," &c. and saying "in his majesty's court of king's bench, at Westminster."]

In the Exchequer.

Michaelmas Term, 48 Geo. III.

The like in the Exchequer. (b)

—, (to wit.) John Doe a debtor to our sovereign lord the now king, cometh before the barons of his majesty's Exchequer, at Westminster, on —, the — day of —, [the

(a) If it be advisable to insert several demises with only one ouster, the second and other demises are here to be stated as follows: "And whereas also, G H on the — day of —, in the — year of the reign aforesaid, at, &c. aforesaid, had demised to the said John Doe, — other messuages," &c. (describing them as in the first count, and then stating the entry

and ouster in the plural number.) If several distinct ousters should be necessary, state the first demise, entry and ouster as far as the † p. 403. and then insert the second demise, entry and ouster.

(b) Most of the notes to the precedent, ante, 394 to 397. are also here applicable.

last day of the term preceding the time of service of the ejectment,] On a vacant possession.
 in this same term, by — his attorney, and complains by bill against Richard Roe, present here in court, the same day of a plea of trespass and ejectment of farm: For that whereas, &c. [as in the last precedent concluding as follows:] to the damage of the said John Doe of 50*l.* whereby he is the less able to satisfy our said lord the king, the debts which he owes to his majesty at his said Exchequer, and therefore he brings his suit, &c.

* 404

Pledges, &c.

[The notice to appear is to be precisely as ante, 397. with the exception of the words, "in the office of pleas of his majesty's court of Exchequer, at Westminster."]

Notice to appear thereto.

The declaration in ejectment on a vacant possession, is the same as in other cases, [see the precedents, ante, 394 to 404.] except that the plaintiff and defendant, as well as the lessor of the plaintiff, are in this case the real parties; as for instance, *A B* the lessee of the premises should be the plaintiff, in lieu of John Doe, *C D* (a real ejector) the defendant, in lieu of Richard Roe, and *E F* (the party entitled to possession) the lessor of the plaintiff, and instead of the common notice at the end, substitute the following.

On a vacant possession. (c)

Mr. ———,

Take notice, that unless you appear in his majesty's court of king's bench, at Westminster, in — term, (or if in London or Middlesex, "the first day of next — term,") at the suit of the above-named plaintiff *A B*, and plead to this declaration in ejectment, judgment will be thereupon entered against you by default.

Notice to appear thereth.

Dated, &c.

Yours, &c.

J K, plaintiff's attorney.To Mr. *G H*, (the last occupier.)

General imparlan-
ces.

*IMPARLANCES.

In the King's Bench.

——— (d) Term, 48 Geo. III.

Common impar-
lance by
bill. (e)

C D } And now at this day, that is to say, on — next after
ats. }
A B. } —, in this same term, until which day said *C D* had
leave to imparl to the said bill, and then to answer the same,
before our said lord the king at *Westminster*, come as well the
said *A B* by his attorney aforesaid, as the said *C D* by *E F*
his attorney, and the said *C D* defends the wrong and injury,
when, &c. and says that the said *A B* ought not further (e) to
have or maintain his aforesaid action thereof against him, be-
cause he says, &c. [state the subject matter of defence.]

In the King's Bench, (or C. P.)

——— (f) Term, 48 Geo. III.

The like by
original.

C D } And the said *C D*, by *E F* his attorney, comes and de-
ats. }
A B. } fends the wrong and injury, when, &c. and prays a day
thereupon to imparl to the said declaration of the said *A B*
and it is granted to him, &c. And upon this a day is given to
the parties aforesaid, before our lord the king, until —, (g)
*wheresoever, &c. that is to say, for the said *C D* to imparl to
the declaration aforesaid, and then to answer the same; at which
day, before our said lord the king at *Westminster*, come the
parties aforesaid, by their attorneys aforesaid, and the said *C D*
says, &c. [to the end of the plea.]

* 406

In the King's Bench,

——— Term, 48 Geo. III.

General im-
parlance and
suggestion of
the death of
one of the de-
fendants, be-
tween declara-
tion and plea.

C D & E F }
ats. } And the said *C D* and *E F*, by *G H* their attor-
A B. } ney, come and defend the wrong and injury,
when, &c. and pray leave to imparl to the said declaration,

(d) The term after that of which
the declaration is intituled.

(e) Where the matter of defence
has arisen after the declaration, it
may be proper to commence the plea
with this imparlance, 4 East, 502. 6
East, 413. 3 Lev. 120.

(f) The term after that of which
the declaration is intituled.

(g) A general return day.

(h) The term subsequent to the
declaration. In some cases it is ne-
cessary to state the special impar-
lance on the plea when it is deliv-
ered entitled of a term subsequent to the
declaration, 2 Saund. 2. n. 2.

until — next after —, [or by original, "until —, where-
reover," &c.] and it is granted to them, &c. the same day is
 given to the said *A B* at the same place; at which day before
 our said lord the king at *Westminster*, come as well the said
A B by his attorney aforesaid, as the said *C D* by his attorney
 aforesaid, and the said *E F* cometh not. And hereupon the
 said *C D* gives the court here to understand and be informed,
 that after the last continuance of the plea aforesaid, and before
 this day, to wit, on —, at, &c. aforesaid, the said *E F* died, and
 the said *C D* survived him, which allegation the said *A B* doth
 not deny, but admits the same to be true; therefore let all fur-
 ther proceedings in this cause against the said *E F* be stayed.
 And the said *C D* saith, [*here state the subject matter of the*
plea of the surviving defendant.]

*General im-
 parlanes.*

In the King's Bench.

— (h) Term, 48 Geo. III.

*Special im-
 parlanes.*

C D } And the said *C D*, (or if misnomer be pleaded, say "and
 ats. } *A B*. } *C D*, who is sued by the name of *E D*), *in his proper
 person comes, and saving to himself all advantages and excep-
 tions to the said bill, prays leave to imparl thereto, and it is
 granted to him, c. And thereupon a day is thereof given to
 the parties aforesaid, before our lord the king at *Westminster*,
 until — next after —, to wit, to the said *C D* to imparl
 to the bill aforesaid, and then to answer the same; at which
 day, before our said lord the king at *Westminster*, come as well
 the said *A B* by *E F* his attorney, as the said *C D* in his
 proper person, (or "by — his attorney,") and the said *C D*
 says, &c. (*state the subject matter of the defence.*)

*Special im-
 parlanes
 bill (i)*

* 407

In the King's Bench.

— (k) Term, 48 Geo. III.

C D } And now at this day, that is to say, on — next after
 ats. } *A B*. } —, in this same term, until which day the said *C D*,
 saving and reserving to himself all and all manner of exceptions

*This like in
 another form.*

(h) The term subsequent to the de-
 claration. In some cases it is necessa-
 ry to state the special imparlanes on
 the plea when it is delivered entitled
 of a term subsequent to the declara-
 tion, 2 Saund. 2. n. 2.

(i) See the form, Lib. Plao. 2. pl.
 15. and the law, 2 Saund. 2. n. 2. As to
 imparlanes in general, see *ante*, vol.
 1. Index, tit. Imparlanes.

(k) *Ante*, 406. n. (h). As to impar-
 lanes in general, *ante*, vol. 1. Index,
 tit. Imparlanes.

Special imparlance. to the said bill of the said *A B*, had leave to imparl to the said bill, and then to answer the same, before our said lord the king at Westminster, come as well the said *A B* by — her attorney, as the said *C D* by — his attorney, and the said *C D* defends the wrong and injury, when, &c. and prays judgment of the said bill, because he says, &c. [*state the subject matter of the defence.*]

In the King's Bench, (or C. P.)

— (1) Term, 48 Geo. III.

Special imparlance by original (m). *C D* } And the said *C D*, (or if misnomer be pleaded, say “and
ats. } *A B*. } *C D*, who is sued by the name of *E D*,”) in his proper
person comes, and saving to himself all advantages and exceptions
* 408 as well to the writ as to the declaration aforesaid, prays
leave to imparl thereunto, here, until, &c. and it is granted to
him, &c. the same day is given to the said *A B*, here, &c. at
which day, comes here as well the said *A B* by — his attorney,
as the said *C D* in his proper person, (or by — his attorney,) and the said *C D* says, &c.

General special imparlance (n).

A general special imparlance differs only from the last three forms, in this, that instead of the words in *italics*, the following are to be inserted, “and saving of all advantages and exceptions whatsoever.”

* 409

*DEFENCES.

In the King's Bench, (or “C. P.” or “Exchequer.”)

— Term, 48 Geo. III.

Defence on appearance by attorney.

C D } And the said *C D*, by — his attorney, comes and
ats. } *A B* } defends the wrong (or in trespass or ejectment, “force”)

(1) As to the term, *ante*, 406. n. (k).
(m) See the form, *Hern*. 10. and the law, 2 *Saund.* 2. n. 2. As to imparlances in general, *ante*, vol. 1. Index, tit. *Imparlances*.

(n) As to when this imparlance is necessary, see 2 *Saund.* 2. n. c. *Ante*, vol. 1. Index, tit. *Imparlance*.

and injury, when, *(e)* and says that, &c. (*here state the subject matter of the plea.*)

C D } And the said *C D* and *E F* his wife, by *G H* their at- The like by
ats. } torney, come and defend the wrong and injury, when, husband and
A B. } &c. and say, that, &c. wife.

C D } And the said *C D*, in person, *(h)* comes and de- The like on
ats. } fends the wrong and injury, when, &c. and says that, appearance by
A B. } &c. a *feme covert*.

* 410
C D, sued by the name of *E D*, } And *C D*, *(y)* against whom Defence by a
ats. } the said *A B* hath exhibit- person sued
A B. } ed his said bill, by the name of *E D*, in person, (or "*by* — by a wrong
his attorney,") comes and defends the wrong and injury, when, name.
&c. and says, &c.

C D } And the said *C D* by *G H*, admitted by the said court Defence by an
ats. } here, as guardian of the said *C D*, to defend for the infant. *(r)*
A B. } said *C D*, who is an infant under the age of twenty-one years,
comes and defends the wrong and injury, when, &c. and
says, &c.

(o) The "*&c.*" will imply *half* defence, in cases where such defence should be made, or full defence where the latter is necessary; and therefore the distinctions between *half* and *full* defence are now obsolete. 8 T. R. 633. Willes, 40. 2 Saund. 209. c. According to the old books, *half* defence was as follows: "And the said *C D* by — his attorney, (or "*in his own proper person,*") comes and defends the wrong and injury, and says," &c. (omitting the words "*when &c.*") and *full* defence was as follows: "And the said *C D* by — his attorney, comes and defends the wrong and injury, when and where it shall bevoe him, and the damages, and all which he ought to defend, because he says," &c. 2 Saund. 209. o.

(p) Must not be by attorney, 2 Saund. 209. c.

(q) Whenever the defendant pleads in a different name to that in which he is sued, whether in abatement, (5 T. R. 487.) or in bar, (3 Wils. 415. 3 Wentw. 210.) the plea must begin as above, and not with the words, "*And the said C D,*" because by introducing the word "*said*" he would admit himself to be the person sued, Willes, 41. n. c. 2 Saund. 209. b.

(r) A person who is an infant at the time of pleading, must plead by *guardian*, 2 Saund. 117. f. n. 1. 212. a. n. 4.

*PLEAS IN ABATEMENT.

Privilege.

In the King's Bench.

—(s) Term, 48 Geo. III.

Plea of privilege by an attorney of C.P. to an action in K. B. (t)

C D gent. one, &c.

ats.

A B.

} And the said C D in his own proper person, comes and defends the wrong

and injury, and says, that before and at the time of the exhibiting of the said bill of the said A B, he the said C D was, and from thence hitherto hath been, and still is, one of the attorneys of the court of our lord the king of the bench at Westminster, in the county of Middlesex: and that he the said C D, during all the time aforesaid, hath prosecuted and defended, and still doth prosecute and defend divers suits and pleas in the same court of the bench, for divers liege subjects of our said lord the king, as their attorney; and the said C D further

* 412

● (s) As to the title of the term, and when an imparlance is necessary, see *ante*, 406, 407, 408. 2 Saund. 2. n. 2. A plea in abatement must not be entitled of a term subsequent to the declaration without a special imparlance, and if it be, the plaintiff may treat the plea as a nullity, and sign judgment, 7 T. R. 447. n. d. but it may be entitled of the preceding term, 1 T. R. 278. or of the subsequent term with a special imparlance, as *ante*, 406, 407, 408.

(t) See *ante*, vol. 1. Index, tit. Abatement, and the precedents, 1 Lil. Ent. 3. 9. 1 Wentw. Index, 4. 18. 8 T. R. 631. 1 Mod. Ent. 2. 11. Lutw. 639. Sometimes the precedents commence by defending the wrong and injury, *when, &c.* and that the court ought not to take cognisance, and this will suffice, see 8 T. R. 631. but it seems more correct

to omit the "*when, &c.*" and only to conclude the plea by praying judgment, if the court will take further cognisance of the suit, see 3 T. R. 186. Gilb. C. P. 209. Lutw. 639. Latch. 178. When an attorney, or other officer of the court, is sued out of his own court, his plea of privilege may be considered as a plea to the jurisdiction; but when he is sued in his proper court, but by improper process, as by latitat, or original writ in the king's bench, the plea may be considered as in abatement of the writ, and may conclude accordingly, as in the plea in Comerford v. Price, Doug. 312. *post*, 414. which was held good on demurrer. There are precedents, however, which in both cases conclude "whether the defendant ought to be compelled to answer," 1 Wentw. 39, 40. 53. 64. 2 Saund 209. d. s. in notes.

saith, that he and all other the attorneys of the said court of *Privilege.*
the bench, prosecuting and defending suits and pleas for their
clients, in the said court of the bench, ought by an ancient
and laudable custom, from time immemorial, used and approved
of according to the laws and customs of this realm, and the
liberties and privileges of the said court of the bench, to be
free and exempt from being compelled against their will, and
have not, nor hath any, or either of them at any time or times
whatsoever, hitherto been used or accustomed to be compelled
to answer any plea or plaint, in any action personal, (pleas of
freehold, felony, and appeals only excepted,) before any justices
or ministers of our said lord the king, or other judge whomso-
ever, in any court whatsoever, except before the justices of our
said lord the king of the court of the bench at *Westminster*
aforesaid, by bill filed in the said court, against such attorney
or attorneys as present there in court; and this he is ready to
verify, wherefore he prays judgment if the said court of our
said lord the king, before the king himself now here, will, or
ought to take cognisance of the said plea. [*Add an affidavit of*
the truth, as below.](u)

In the K. B. (or C. P.)

between { *A B*, ... plaintiff,
and
C D, gent. one, &c. defendant. *Affidavit of*
C D, of —, gentleman, one of the attorneys of the court *the truth*
of —, the defendant in this cause, maketh oath, and saith, *thereof (u)*
that the plea hereunto annexed, is true in substance and fact.
Sworn, &c. *C D.*

**In the King's Bench.*

—(x) *Term*, 48 *Geo. III.*

* 413

C. D, gent. one, &c. } And the said *C D*, in his own proper *Plea of privi-*
ats. } person, comes and defends the wrong *lege by an at-*
A B. } *torney of K.B.*
sued by lati-
tat. (y)

(u) It is doubtful whether a plea of privilege by an attorney, need be verified by affidavit, 3 B. & P. 397. *Prac. Reg.* 5. *Ante*, vol. I. Index, fit. Affidavit.
(x) As to the title of the term, and when an imparlance is necessary, see *ante*, 411. n. (s). 2 *Saund.* 2. note 2.
(y) Observe the notes to the last precedent.

Privilege.

and injury, and says, that before and at the time of the exhibiting the bill of the said *A B*, he the said *C D* was, and from thence hitherto hath been, and still is, one of the attorneys of the court of our said lord the king, before the king himself present here in court, in his own person, and that he the said *C D* during all the time aforesaid, hath prosecuted and defended, and still doth prosecute and defend, divers suits and pleas in the same court, for divers liege subjects of our said lord the king, as their attorney: And the said *C D* further saith, that he and all other the attorneys of the said court of our said lord the king, before the king himself, prosecuting and defending suits and pleas for their clients in the said court of our said lord the king, before the king himself, ought by an ancient and laudable custom, from time immemorial used and approved of according to the laws and customs of this realm, and the liberties and privileges of the said court, have been and ought to be in all personal suits, at the suit of any subjects of our said lord the king, impleaded only by bill exhibited, in the said court of our said lord the king, before the king himself, against such attorneys respectively, as being present in the same court, in their own proper persons, and not as being in the custody of the marshal of the marshalsea of our said lord the king, before the king himself; and this he the said *C D* is ready to verify; wherefore because he the said *C D* is not impleaded in this action as one of the attorneys of the said court of our said lord the king, before the king himself, he the said *C D* prays judgment whether he ought to be compelled to answer the said bill, &c. [*Add an affidavit of the truth of the plea, as ante, 412.*]

* 414

Another plea
of privilege
of defendant
as attorney of
K. B. to an
action by original.

*[*The following is the plea in Comerford v. Price, Doug. 312 which was holden sufficient on demurrer.*] And the said *C D* in his own proper person comes and defends the wrong and injury, and says that he ought not to be compelled to answer the said original writ, because he says, that he the said *C D* now is, and on the day of suing out the said original writ, and long before, was, one of the attorneys of the court of our said lord the king, before the king himself, and that according to the custom of the said court, and the privileges of such attorneys from time whereof the memory of man is not to the con-

ary, used and approved of in the same court, every attorney of the same court, who is sued and impleaded in the same court of our said lord the king, before the king himself, in any personal action at the suit of any subject of this realm, during the time of his remaining and being an attorney of the said court, ought to be sued and impleaded in the said court as a privileged person, that is to say, by bill filed and exhibited in the same court against such attorney as being present in the same court in his own proper person, and that no attorney of the said court, ought, nor of right hath at any time during all the said time whereof the memory of man is not to the contrary, against his will been compelled to answer any person in any personal action prosecuted in the same court here by original writ, sued out against him at the suit of any person. And the said *C D* in fact saith, that he is impleaded by the original writ aforesaid against his will, and against the custom and privileges aforesaid. And this he is ready to verify; wherefore he prays judgment of the said original writ sued out in this cause, and that the same may be quashed. [*Add affidavit of truth, as ante, 412.*]

In the K. B. (or C. P.)

—(z) Term, 48 Geo. III.

Coverture.

C D } And the said *C D* in his person, (or “by *G H* his attorney,”) comes and defends the wrong and injury, when, &c. and prays judgment of the said bill (or “writ”) of the said *A*; because he says that the said *A*, before and at the time of the commencement of this suit, was and still is married to one *E F*, then and yet her husband, who is still living, to wit, at, &c. aforesaid; and this he the said *C D* is ready to verify; wherefore, because the said *E F* is not named in the said bill (or “writ”) of the said *A*, the said *C D* prays judgment of the bill (or “writ”) aforesaid, and that the same

Coverture of the plaintiff.
(a)

* 415

(z) As to the title of the term, and *ante*, 411. n. (s). 3 Saund. 2. n. 2. and when special imparlance is necessary, see vol. 1. Index, tit. Abatement, 47. Id. Index. 9. Lill. Ent. 123.

(a) See the precedents, 1 Wentw. 47. Id. Index. 9. Lill. Ent. 123.

Coverture. may be quashed, &c. [*Add affidavit of the truth in substance as ante, 412.*]

In the K. B. (or C. P.)

—(b) *Term, 48 Geo. III.*

Coverture of the defendant.
(c)

C F, sued by the name of *C D*,
ats.
A B.

} And the said *C*, in her own proper person, (d) comes and

prays judgment of the said bill of the said *A B*, because she says, that at the time of the exhibiting of the said bill of the said *A B*, she was, and still is married to one *E F*, who is still living, to wit, at, &c. aforesaid; and this she is ready to verify; wherefore, because the said *E F* is not named in the bill aforesaid, she prays judgment of the said bill, and that the same may be quashed, &c. [*Add affidavit of the truth, similar in substance to the form, ante, 412.*]

Non-Joinder.

In the K. B. (or C. P.)

—(f) 48 *Geo. III.*

Plea in assumpsit, that the contracts were made jointly with another person not joined. (e)

C D,
ats.

} And the said *C D* by *E F* his attorney, (g) comes and *A B*, } defends the wrong and injury, when, * &c. and prays judgment of the said bill (or "*writ*") and declaration, (h) be-

* 416

(b) As to the title of a term, and when an imparlance is necessary, see vol. 1. Index, Abatement, and, ante, 411. n. (s). 2 Saund. 2. note 2.

(c) Coverture can only be pleaded in *bar*, when the defendant was married at the time when the supposed contract was made. In other cases it must be pleaded in *abatement*, 3 T. R. 631.

(d) In *Lutw. 23*, coverture was pleaded by attorney, but this is incorrect. See 2 Saund. 209. c. Lill. Ent. 1. 2 Rich. C. P. 1.

(e) See the precedents, 1 *Wentw. Index*, and pages 16. 33. 44. 68.

(f) When a special imparlance is necessary, see vol. 1. Index, Abate-

ment, and, ante, 411 n. (s). 2 Saund. 2. n. 2.

(g) May be by attorney, *Lutw. 696*.

(h) When the plea in abatement of non-joinder is to the whole of the action, it is not necessary to plead in abatement both of the declaration and writ, but it is sufficient to plead to the writ or bill only, but where it is intended to plead in abatement only of part of the writ, and the cause of abatement arises from some of the counts of the declaration, the defendant must plead in abatement of both, 2 Saund 210. n. c. and the precedent 2 B. & P. 420.

cause he says that the said several supposed promises and undertakings in the said declaration mentioned, if any such were made, were made jointly with one *E F* who is still living, (i) to wit, at, (k) &c. and not by the said *C D* alone; and this he the said *C D* is ready to verify; wherefore, inasmuch as the said *E F* is not named in the bill (or "*writ*") together with the said *C D*, he the said *C D* prays judgment of the said bill (or "*writ*") and declaration, and that the same may be quashed, &c. [*Add affidavit, as ante, 412.*]

Non-joinder.

To *debt on bond*, the plea in abatement of non-joinder craves *oyer* of the bond, and avers that the party omitted sealed and delivered the deed, and that he is still living, see 1 Saund. 291. a. n. 2. b. n. 4. See the precedents, *Lutw.* 696. *Lil. Ent.* 2. 2 *Rich. Prac.* K. B. 17. *Asst. Ent.* 7. See a precedent of a plea in abatement in *covenant*, *Lil. Ent.* 7. and 200 *Rich. Prac.* K. B. 18.

The like to a declaration in debt on bond, &c.

In the *K. B.*

—(m) *Term*, 48 *Geo.* III.

C D, sued by the name of *E D*, } And *C D*, (n) against
ats. } whom the said *A B*
A B. }
*hath exhibited his said bill by the name of *E D*, in his own person (o) comes and says that he was baptized by the name of *C*, to wit, at, &c. aforesaid, and by the christian name of *C* hath always since his baptism hitherto been called and known, without this that he the said *C D* now is, or at the time of

Misnomer of defendant's christian name. *K. B.*

(l) * 417

(s) A plea in abatement of non-joinder of a party who should be a defendant, must aver that the party omitted is still living, 1 Saund. 291. a. n. 2. b. n. 4.

(k) No venue is necessary, 2 Hen. Bl. 161. 7 T. R. 243.

(l) See the precedents, *Lil. Ent.* 6. 1 *Wentw. Index*. In this plea the defendant must give his surname, as well as his true christian name, although his true surname is used in

the declaration, 8 T. R. 515. 2 Saund. 209. b.

(m) As to the title of the term, *ante*, 411. n. (s), and 1 T. R. 278. 7 T. R. 447.

(n) The plea must not begin, "and the said *C D*," &c. *ante*, 410. n. (g). 5 T. R. 487. 2 Saund. 209. b. As to the necessity for the surname being given, *supra*, note (l).

(o) It appears most advisable to plead misnomer in person, 2 Saund. 209. b.

Misnomer.

exhibiting the said bill, was or ever before had been called or known by the christian name of *E*, as by the said bill is supposed, and this he the said *C D* is ready to verify; wherefore he prays judgment of the said bill, and that the same may be quashed, &c.

In the King's Bench.

Affidavit of
the truth
thereof.

Between $\left\{ \begin{array}{l} A B, \\ C D, \text{ sued by the name of } E D, \end{array} \right.$ Plaintiff,
and
Defendant.

C D, of —, the defendant in this cause, maketh oath and saith, that the plea hereunto annexed is true in substance and fact.

C Sworn, &c.

C D.

The like in *C*.
P. (p)

C D, sued by the name of *E D*, }
ats. } And *C D*, against whom the
A B. } said *A B* hath issued his said
writ, and declared thereon by the name of *E D*, comes and says, that he was baptized by the name of *C*, to wit, at, &c. aforesaid, and by the christian name of *C* hath always since his baptism hitherto been called and known, without this that he the said *C D* now is, or ever was called or known by the christian name of *E*, as by the said writ and declaration thereon founded is supposed. And this he the said *C D* is ready to verify; wherefore he prays judgment of the said writ and declaration thereon founded, and that the same may be quashed, &c. [*Affidavit as in the last precedent.*]

418

Misnomer of
defendant's
surname in
K B. (q)

**C D*, sued by the name of *C E*, }
ats. } And *C D*, against whom the
A B. } said *A B* hath exhibited his
bill by the name of *C E*, in his own proper person comes and says, that he is named and called by the name of *C D*, and by

(*p*) As to the title of the term, (*q*) As to the term, see *ante*, 416. see *ante*, 411. n. (*s*), 416. n. (*m*). See n. (*m*). See the precedent, 1 Wentw. 2 Saund. 209. b. 1 B. & P. 647, 648. Index, of christian and surname, 1 and 3 B. & P. 399. Wentw. 1.

the said surname of *D* hath always hitherto been called and known, without this that he the said *C D* now is, or ever was named, or called, or known by the surname of *E*, as by the said bill is supposed, and this he the said *C D* is ready to verify; wherefore he prays judgment of the said bill, and that the same may be quashed, &c. *Misnomer.*

And the said *C D* in his own proper person, comes and defends the wrong and injury, when, &c. and prays judgment of the said bill, because he says that the said *A B*, the now plaintiff, now is, and before, and at the time of exhibiting the bill aforesaid, was called and known by the surname of *D*, to wit, at, &c. aforesaid, without this that he the said *A B* the now plaintiff, now is, or before, or at the time of exhibiting the bill aforesaid, was called or known by the surname of *B*, as in and by the said bill is above supposed, and this he the said *C D* is ready to verify; wherefore he prays judgment of the said bill, and that the same may be quashed, &c. *Misnomer of plaintiff's surname in K. B. (r)*

In the King's Bench.

—(s) Term, 48 Geo. III.

Another action perilling.

E D } And the said *C D* by — his attorney, comes and defends the wrong and injury, when, &c. and prays
A B }

Another action depending for the same cause in K. B. (t)

* 419

(r) See the precedent, 1 East, 542.

(s) As to the title of the term, and when a special imparlance is necessary, see *ante*, 411. n. (s), and 1 Mod. Ent. 6.

(t) As to these pleas in general, see Com. Dig. Abatement, H. 24. Bac. Abr. Abatement, M. and the precedents nearly similar to the above in 1 Wentw. 8. 1 Mod. Ent. 6. Lil. Ent. 7. The precedents of pleas in abatement of another action depending, vary in point of form; sometimes they set forth the declaration in the first action, but others, as in the above precedent, are more concise. Precedents of the first de-

scription are in 3 Ld. Raym. 53. Clift. Ent. 2. 22. 1 Mod. Ent. 103. Salk. 716. 1 Wentw. 44. 52. 64. 3 Wentw. 140. and in *scire facias*, 2 Lil. Ent. 392. Those of the latter description are in 3 Ld. Raym. 57. Lutw. 33. Lil. Ent. 7. Mod. Ent. 6. Clift. Ent. 8. 1 Wentw. 8. It is said that when the writ is general, and does not express the cause of action, the plea in abatement must shew that the plaintiff declared in the former suit, because otherwise it cannot be traversed whether or not it were for the same cause of action, 5 Co. 61. b. and Lil. Prac. Reg. 8. E. Bac. Abr. Abatement, M. but this reason does not appear satisfactory, for

Another action pending.

judgment of the said bill, (u) because he says that before the exhibiting of the said bill, to wit, in *Michaelmas term*, (x) in the — year of the reign of our lord the now king, in the court of our said lord the king, before the king himself, the said court then and still being holden at *Westminster*, in the county of *Middlesex*, the said *A B* impleaded the said *C D*, and exhibited his certain bill against him, in a plea of debt on demand of and upon the said identical writing obligatory (or “in a certain plea of trespass on the case upon the very same identical promises and undertakings”) in the said declaration, in this present suit mentioned, (y) as by the record and proceedings thereof remaining in the said court of our said lord the king, before the king himself, to wit, at *Westminster* aforesaid, more fully appears. And the said *C D* further saith, that the parties in this and the said former suit are the same, and not other or different persons; and that the said former suit, so brought and prosecuted against him the said *C D* by the said *A B* as aforesaid, is still depending in the said court of our said lord the king, before the king himself, (a) and this the said *C D* is ready to verify; wherefore he prays judgment of the said bill, in this suit, and that the same may be quashed.

* 420

In most instances and particularly in declarations, *in indebitatus assumpsit* the declaration is so general, that it does not conclusively shew that the two actions are for the same cause, see 6 T. R. 307. 3 Wentw. 142. and by the plaintiff's particulars of demand in the first action or otherwise, it may appear what was the subject matter of the first action, though the plaintiff may not have declared, and it is now settled, that in a plea in bar of judgment recovered, it is not necessary to set out the declaration in the former cause, 1 Saund. 92. n. 2. and therefore we may conclude that the

above concise form will now suffice.

(u) Sometimes the plea commences and concludes with a prayer of judgment, whether the defendant ought to be *compelled to answer, &c.* Lil. Ent. 6. but the above form seems most correct.

(x) When it is necessary to state a particular day, 2 Lev. 141.

(y) As to this concise statement, without setting out the former declaration, see *supra*, n. (t).

(a) As to this averment, see *Bac. Abr. Abatement, M. sed quere*, see opinion, 1 Wentw. 2.

*PLEAS IN BAR.

COMMON COMMENCEMENTS AND CONCLUSIONS.

In the King's Bench, (or "C. P." or "Exchequer.

*Commence-
ments and
conclusions.*

———(a) *Term, 48 Geo. III.*

C D } And the said(b) *C D* by *E F* his attorney,(c) comes
ats. } and defends the wrong (or in trespass or ejectment, say
A B. } "force") and injury, when, &c. and says that the said *A B*
ought not to have or maintain his aforesaid action thereof
against him,(d)† because he says, that, &c. [here state the sub-
ject matter of the defence, after which conclude either to the
country, or with a verification as in the following precedents.]

1st. Com-
mencement of
a first plea
when special.

Action non.

In the K. B. (or "C. P." or Exchequer.")

——— next after ———(f)

in ——— *Term, 48 Geo. III.*

C D } And the said *C D* by *E F* his attorney, comes and de-
ats. } fends the wrong (or in trespass or ejectment, say
A B. } "force") and injury, when, &c. and says, that the said *A B*
ought not further to have or maintain his aforesaid action
thereof against him, because he says, that, &c.

2dly. The
like where the
matter of the
defence arose
after com-
mencement of
the action.(e)

And for a further plea in this behalf, the said *C D* by leave
of the court here, for this purpose first had and obtained, *ac-
cording to the form of the statute in such case made and pro-

3dly. Com-
mencement of
a second spe-
cial plea.

* 422

(a) Usually the term of which the plea is pleaded, see vol. 1. Index, Pleas. As to the title of the term, and when an imparlance is necessary, see ante, 411. n. (s).

(b) When this word is improper, see ante, 410. n. (g).

(c) An infant or feme covert cannot plead by attorney, ante, 409, 410.

(d) This is technically termed the *action non*.

(e) When the subject matter of the defence has arisen since the commencement of the action, this mode of pleading must be adopted, 4 East, 502.

(f) The plea should be entitled after the matter of defence arose.

Commence-
ments and
conclusions.

vided, (g) says that the said *A B* ought not to have or maintain his aforesaid action thereof against him, † because he says, that, &c.

4thly. The
like to a parti-
cular count or
particular
trespasses.

And for a further plea in this behalf, as to the said first count of the said declaration, [or if in covenant "as to the said supposed breach of covenant first above assigned," or if in trespass, "as to the breaking and entering," &c. enumerating the particular trespasses mentioned in the declaration, and intended to be justified,] the said *C D* by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said *A B* ought not to have or maintain his aforesaid action thereof against him, † because he says, that, &c.

5thly. Conclu-
sion to the
country.

[After stating the subject matter of the plea, if it be a denial of an allegation in the declaration, not being matter of record, the plea should conclude to the country as follows:] And of this he the said *C D* puts himself upon the country, &c.

6thly. Conclu-
sion with a
verification.

[If the defence consist of an allegation of new matter, it should in general conclude with a verification. 1 *P. W.* 258. thus:] And this he the said *C D* is ready to verify; wherefore he prays judgment, if the said *A B* ought to have or maintain his aforesaid action thereof against him, &c.

7thly. Conclu-
sion with a
verification by
the record.

And this he the said *C D* is ready to verify by the said record, wherefore he prays judgment, if the said *A B* ought to have or maintain his aforesaid action thereof against him, &c.

(g) 4 Ann. c. 16. s. 4, 5. It is pro- Andr. 108. 1 Will. 219. Cowp. 509,
per to mention the suit in the intro- 501. 1 Hen. Bl. 275. 278.
ductory part of the plea as above,

*IN ASSUMPSIT.

In the K. B. (or "C. P." or "Exchequer.")

*General issue,
&c.*

— Term, 43 Geo. III.

C D } And the said *C D* by ——— his attorney, comes and
ats. }
A B. } defends the wrong and injury, when, &c. and saith
that he did not undertake or promise in manner and form as
the said *A B* hath above thereof complained against him, and
of this he puts himself upon the country, &c.

*General issue,
non assump-
sit.*

C D, executor, &c. } And the said *C D, executor (or "admini-
ats. }
A B.* } *istrator")* as aforesaid, by *E F* his at-
torney, comes and defends the wrong and injury, when, &c. and
says that the said *G H(h)* deceased, in his life-time did not
undertake or promise, in manner and form as the said *A B*
hath above thereof complained against him, and of this he
puts himself upon the country, &c.

*The like by an
executor or
administrator.*

*First plea general issue, and the commencement of the second
plea, as ante, 421. third precedent and then as follows:]* Be-
cause they say that the said several supposed *promises and
undertakings, in the said declaration, if any such were or was
made, were and each and every of them, was made by them the
said *C D* and *E F* together with the said *A B*, one of the said
plaintiffs jointly, and not by them the said *C D* and *E F* sepa-

*Plea in bar
that the con-
tracts were
made by de-
fendants joint-
ly with one of
the plaintiffs.
(f)*

* 424

(h) If the declaration contain counts on promises by the executor in that character, the plea must also deny those promises.

(i) As to this plea, see 2 B. & P. 124, 125. In *Moffatt and others v. Van Millingen and others*, Michael-

mas term, 37 Geo. III. a plea in abatement to the same effect was held good on demurrer, see MSS. Precedents, 23 vol. 71. See plea by an executor, that testator had a partner who survived him. 5 East, 261

General issue, &c. rately, from and without the said *A B*, to wit, at, &c. aforesaid and this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

Infancy of de-
fendant. (k) } *C D* } And the said *C D* by *E F* his attorney, [or if the de-
ats. } *A B*. } fendant be still an infant, say by "*G H*," admitted (l)
by the court of our said lord the king, before the king him-
self, (or in C. P. "by the justices of our said lord the king
here,") as guardian (m) of the said *C D*, to defend for the
said *C D*, who is an infant under the age of twenty-one years,]
comes and defends the wrong and injury, when, &c. and says
that the said *A B* ought not to have or maintain his aforesaid
action thereof against him, because he says, that he the said
C D at the time of making of the said several supposed pro-
mises and undertakings in the said declaration mentioned, was an
infant within the age of twenty-one years, to wit, of the age
of — years, (n) to wit, at, &c. aforesaid, (o) and this, &c.
[*conclude with a verification, as ante, 422. sixth precedent.*]

* 425

Coverture of
defendant. (p)

* *C D* } And the said *C D* in person (q) comes and defends the
ats. } *A B*. } wrong and injury, when, &c. and says, that the said
A B ought not to have or maintain his aforesaid action thereof
against her, because she says that she the said *C D* before, and
at the time of the making of the said several supposed promises
and undertakings in the said declaration mentioned, was and

(k) Infancy may be given in evi-
dence under the general issue in
assumpsit, 1 B. & P. 481. n. a.
Ante, vol. 1. Index, tit. Infancy. But
it is in general better to plead it.

(l) This should be stated, 2 Saund.
117. f. n. 1.

(m) An infant must defend by
guardian, and not by *prochein ami*, 2
Saund. 117. f. n. 1.

(n) The precise age is not here ma-
terial.

(o) The venue in the declaration,
but the omission would not prejudice,
Hen. Bl. 161. 1 Saund. 5. n.

(p) Coverture may in *assumpsit*, and
indeed in debt, be given in evidence
under the general issue; but it is fre-
quently advisable to plead it, 12 Mod.
101. When the defence is not that the
feme was married at the time the
contract was made, but merely that
her husband ought to be joined in the
action, the coverture must be pleaded
in *abatement*, and not as above in bar,
ante, 415 n. (c).

(q) If the defendant be still marri-
ed, she must plead in person and not
by attorney, *ante*, 415. n. (d). 409.

still is the wife of one *G D*, to wit, at, &c. aforesaid, and this, *Alien enemy.*
&c. [*conclusion with a verification, as ante, 422. sixth precedent.*]

[*First general issue, (r) and then actio non, as ante, 421. third precedent to the obelisk,*] because he says, that the said *A B* is an alien, born in foreign parts, out of the allegiance of our lord the now king, and within the allegiance of a foreign state; to wit, of, &c. to wit, at, &c. aforesaid, and not made a subject of our said lord the king, by naturalization, denization, or otherwise; and the said *C D* further saith, that long before, and at the time of the commencement of this suit, the persons exercising the powers of government in the said foreign state of — aforesaid, were and still are at war with, and the enemies of our said lord the king, to wit, at, &c. aforesaid and that the said *A B* so being such alien born as aforesaid, and an enemy of our said lord the king, and not made a subject of our said lord the king by *naturalization, denization, or otherwise, entered and came into this kingdom, and still remains herein, not having any letters of safe conduct from our said lord the king, or any license or permission of our said lord the king, to be, reside, or remain in this kingdom, and this, &c. [*conclusion with a verification, as ante, 422. sixth precedent.*]

Plaintiff an
alien enemy
resident here.
(s)

* 426

[*Third plea, actio non, as ante, 421. third precedent to the obelisk,*] because he says that the said *A B* is an alien, born in foreign parts, out of the allegiance of our said lord the king, and within the allegiance of a foreign state, to wit, in, &c. aforesaid, that is to say, at, &c. aforesaid, and not a subject of our lord the king, by naturalization, denization, or otherwise; and the said *C D* further saith, that at the time of the commencement of this suit, the persons exercising the powers of government, in, &c. aforesaid, were and still are at war with, and enemies of our said lord the king, to wit, at, &c. aforesaid; and

Plaintiff alien
enemy, resi-
dent abroad.
(t)

(r) The court of C. P. will not permit the defendant to plead double, *252. 4 Mod. 405. 4 East, 502. 3 W. 255. Stat. 43 Geo. III. c. 155. 1 B. & P. 929.*

(t) See the notes to the last prece-

(s) As to this plea and the precedent and the form, *4 East, 602.*

Bankruptcy. that the said *A B*, so being such alien born, and such enemy as aforesaid, at the time of the commencement of this suit, was and still is resident and living out of this kingdom, and within the republic aforesaid, and adhering to the said enemies of our said lord the king, &c. and this, &c. [*Conclude with a verification, as ante, 422: sixth precedent.*]

Bankruptcy of
defendant. (u)
* 427

[*Actio non, as ante, 421. precedent to the obelisk,*] because he says, that after the making of the said several *promises and undertakings in the said declaration mentioned, and before the exhibiting of the bill of the said *A B* in this behalf, (or in *C P.* "before the commencement of this suit,") to wit, on the — day of —, *A. D.* — he the said *C D* became a bankrupt within the true intent and meaning of the several statutes then in force concerning bankrupts, to wit, at, &c. aforesaid, and that the said causes of action in the said declaration mentioned, and each of them, did accrue to the said *A B* before he the said *C D* so became a bankrupt, as aforesaid, (x) to wit, at, &c. aforesaid, and of this he the said *C D* puts himself upon the country, &c. (y)

In the King's Bench (or C. P.)

— next after —
in — (a) Term, 48 Geo. III.

Plea of bankruptcy of defendant where the certificate was obtained after the commencement of the suit. (z)

[*First, general issue, as ante, 423. 2d, common plea of bankruptcy, as ante, 426. and 3d as follows:*] And for a further plea

(u) The defendant may also plead the general issue and any other plea. This plea is given by the stat. 5 Geo. II. c. 30. s. 7. And if the certificate were allowed before the action was commenced, this general form will suffice, see 3 Wentw. 183. a. b. But if the defendant did not obtain his certificate till after the commencement of the action, he cannot plead his bankruptcy in the above general form, but must plead it specially, setting out the proceedings, 6 East, 413. and must shew the allowance of the certificate by the chancellor, 6 T. R. 605. 607. See a plea of bankruptcy in Ireland, 2 Hen. Bl. 551. in America, 5 East, 124. The bankruptcy of the plaintiff may be given in evidence under the general issue in

assumpsit, 7 T. R. 396. Bull. N. P. 153. If it be pleaded specially, all the proceedings must be set forth, 1 B. & P. 448. See the precedents, 7 East, 53. 8 T. R. 140. 1 Wentw. 308, 309. 3 Wentw. Index, 17. Bankruptcy cannot be pleaded by bail, 2 B. & P. 45.

(x) This allegation is necessary, 4 T. R. 156.

(y) The plea is to conclude to the country, 1 P. Wms. 258, 259. 10 Mod. 160. 247. In K. B. the plea needs not be signed by counsel, 6 T. R. 496. But in C. P. it must be signed by a serjeant, 3 B. & P. 171.

(z) See the notes to the last precedent.

(a) Some day in the term after the certificate was allowed.

in this behalf, the said *C D* by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said *A B* ought not further^(b) to have or maintain his aforesaid action thereof against him the said *C D*, because he says, that he the said *C D*, before and on the — day of —, *A. D.* —, and from thence continually, until the suing out of the commission of bankrupt hereinafter mentioned, was a —, and during all *that time did use and exercise the trade of a —, by way of bargaining, exchanging, bartering and chevizance, and sought his trade and living, by buying and selling, to wit, at, &c. aforesaid; and the said *C D*, so using and exercising the trade of a —, and seeking his trade and living as aforesaid, afterwards, to wit, on the — day of —, *A. D.* —, at, &c. aforesaid, became and was indebted to one *E F*, a subject of this realm, in the sum of —*l.* of lawful money of *Great Britain*, for a true and just debt due and owing from the said *C D* to the said *E F*, and the said *C D* was then and there also indebted to divers other persons, in divers other large sums of money, and the said *C D* being so indebted as aforesaid, and being a subject of this realm, and so using and exercising the trade and business of a —, and seeking his trade and living as aforesaid, afterwards, to wit, on the same day and year last aforesaid, at, &c. aforesaid, the said debt to the said *E F*, and the said other debts being then and there due, and wholly unpaid, and unsatisfied; he the said *C D* became and was a bankrupt, within the true intent and meaning of the several statutes then and still in force concerning bankrupts, made and provided, some or one of them, and that thereupon afterwards, to wit, on the — day of —, *A. D.* — aforesaid, at, &c. aforesaid, a certain commission of bankruptcy, under the great seal of *Great Britain*, bearing date at *Westminster*, the same day and year last aforesaid, grounded upon the said several statutes, some or one of them, upon the petition of the said *E F*, was duly awarded and issued out of his majesty's high court of chancery, (the said court then and still being

Bankruptcy.

Defendant a trader.

* 428

Petitioning creditor's debt.

Act of bankruptcy.

Commission issued.

(b) This is necessary, 6 East, 415. 4 East, 502. *Ante*, 421.

Bankruptcy. holden at *Westminster*, in the county of *Middlesex*,) against the said *C D*, directed to certain commissioners therein named, to wit, *G H, I K, L M, N O*, and *P Q*, thereby giving full power and authority to the said commissioners, four or three of them, to proceed according to the several statutes in force concerning bankrupts, not only concerning the said bankrupt, his body, lands, tenements, freehold and customary goods, debts and all other things whatsoever, but also concerning all other persons, who by concealment, claim, or otherwise do offend, touching the premises or any part thereof, contrary to the true intent and meaning of the said statutes; and to do and execute all and every thing and things whatsoever, as well for and towards satisfaction and payment of the creditors, as towards and for all other intents and purposes, according to the ordinance and provision of the same statutes, as in and by the said commission, relation being thereunto had, will more fully appear, by virtue of which said commission, and by force of the said several statutes *concerning bankrupts, the said *G H, I K, and L M*, the major part of the said commissioners named in the said commission, having severally and respectively duly taken the oath prescribed and appointed to be taken by commissioners of bankrupts, according to the form of the statute in that case made and provided, and having then and there entered and kept a memorandum thereof among the proceedings in the said commission, afterwards, to wit, on the said — day of —, *A. D.* — aforesaid, at, &c. aforesaid, did, in due form of law find that the said *C D* became a bankrupt, within the true intent and meaning of the statutes made and then in force concerning bankrupts, before the date and issuing forth of the said commission, and did then and there declare and adjudge him to be a bankrupt accordingly. And the said *C D* further saith, that afterwards, to wit, on the — day of —, *A. D.* — aforesaid, at, &c. aforesaid, due notice was given and published in the *London* gazette, that such commission of bankruptcy had been and was awarded and issued forth against the said *C D*, and that he had been declared a bankrupt thereon, and required to surrender himself, and the said *C D* further saith, that the several meetings were duly appointed for his surrendering himself, and making a full disclosure and discovery of his estate and effects, and finishing his examination

Defendant
found a bankrupt.

* 429

Notice in *London* gazette.

Defendant
surrendered
and examined.

under the said commission, according to the form of the statute in that case made and provided, and that he the said *C D* duly surrendered himself to the major part of the said commissioners, in and by the said commission named and authorised, and submitted himself to be from time to time examined, touching the disclosure and discovery of his estate and effects, and at the last of the said meetings, to wit, on the — day of —, *A. D.* aforesaid, at, &c. aforesaid, finished his examination upon oath before the said commissioners, and upon such his examination, then and there made a full disclosure and discovery of his estate and effects; and the said *C D* further saith, that *he hath always, from the time of issuing forth the said commission hitherto, to wit, at, &c. aforesaid, in all things conformed himself to the said several acts of parliament, made and then in force concerning bankrupts, particularly of a certain act of parliament, made in the 5th year of the reign of his late majesty king *George II.* intituled, “an act to prevent the committing of frauds by bankrupts.” And the said *C D* further saith, that he the said *C D* afterwards, to wit, on the — day of —, *A. D.* — aforesaid, at, &c. aforesaid, duly obtained his certificate of conformity under the said commission to the said statutes, made and then in force concerning bankrupts, and which said certificate afterwards, and before — next after —, in this same term, to wit, on the — day of —, *A. D.* — aforesaid, at, &c. aforesaid, was duly allowed and confirmed by —, then and there being lord high chancellor of *Great Britain*, according to the form of the statute in that case made and provided; and the said *C D* further saith, that the said several causes of action in the said declaration mentioned accrued, and each and every of them did accrue to the said *A B*, before he the said *C D* so became a bankrupt as aforesaid, to wit, at, &c. aforesaid; and this he the said *C D* is ready to verify; wherefore he prays judgment if the said *A B* ought further(b) to maintain his aforesaid action thereof against him the said *C D*, &c.

Bankruptcy.

Defendant's
conformity.

* 430

Defendant's
certificate.Allowance
thereof by the
chancellor.Cause of ac-
tion accrued
before bank-
ruptcy.

(b) This is necessary, 6 T. R. 697.

Insolvent debtor.
Insolvent debtor's act,
 41 Geo. III. c.
 70. s. 38.(c)

* 431

sic non, as ante 421. first precedent to the obelisk,] because he says that he the said *C D* was actually a prisoner in his majesty's prison of —, at the suit of —, on the 1st day of *March*, mentioned in a certain act, made at the parliament of our lord the now king, *holden at *Westminster*, in the county of *Middlesex*, in the 41st year of his reign, intituled, "an act for the relief of certain insolvent debtors," and that afterwards, to wit, at the general quarter sessions of the peace of our said lord the king, holden at, &c. in and for the said county of —, on, &c. before certain then justices of our said lord the king, assigned to keep the peace of our said lord the king, in and for the said county of —, he the said *C D* was duly discharged according to the said act, and the said *C D* further says, that the said several sums of money in the said declaration mentioned, were, and each and every of them was contracted before the said 1st day of *March*, to wit, at, &c. aforesaid, and this, he the said *C D* is ready to verify; wherefore he prays judgment if the said *A B* ought to have execution for his said damages to be adjudged to him in this behalf, on or against the person of him the said *C D*, &c.

In the King's Bench, (C. P. or Exchequer.)

————(c) *Term*, 48 Geo. III.

Non assumpsit, except as to the sum tendered.(d)

C D } And the said *C D* by *E F* his attorney, comes and defends the wrong and injury, when, &c. and as to all the said several supposed promises and undertakings in the said declaration mentioned, except as to the sum of —. (f) parcel of the said several sums of money, in the said declaration mentioned, says that he did not undertake or promise in manner and form as the said *A B* hath above thereof complained against him, and of this he puts himself upon the country, &c. *And as to the said

Tender of that sum.

* 432

(c) The form of this plea will serve if any other insolvent act be pleaded, see the precedents, 3 Wentw. Index, 19.

(d) A defendant cannot plead *non assumpsit* to the whole, and a tender as to part, but must qualify the general issue, and his other pleas as above, admitting the liability as to the sum tendered, 4 T. R. 191.

(e) This may be of the tenor of which the plea is pleaded, though subsequent to the declaration, see 1 Saund. 33. n. 2. cites 1 Burr. 59. 1 Hen. Bl. 369. See also, 2 Saund. 2. n. 2. But see Tidd's Practice, 3d edit. 418, 419.

(f) The sum tendered, see *supra*, note (d).

sum of —l. parcel of the said several sums of money in the said declaration mentioned, the said *C D* says, that the said *A B* bought not to have or maintain his aforesaid action thereof against him, to recover any more or greater damages than the said sum of —l. parcel, &c.(g) in this behalf, because he says that after the making of the said several promises and undertakings in the said declaration mentioned as to the said sum of —l. parcel, &c. and before the exhibiting of the bill(h) of the said *A B* against the said *C D*, (or if in *C. P.* or by original "*and before the commencement of this suit,*") to wit, on, &c.(i) at, &c. aforesaid, he the said *C D* was ready and willing, and then and there tendered and offered to pay to the said *A B* the said sum of —l. parcel, &c. to receive which of the said *C D* he the said *A B* then and there wholly refused; and the said *C D* in fact further saith, that he the said *C D* hath always from the time of the making of the said several promises and undertakings in the said declaration mentioned, as to the said sum of —l. parcel, &c. hitherto, at, &c. aforesaid, been ready to pay, and still is there ready to pay to the said *A B*, the said sum of —l. parcel, &c. and he now brings the same here into court ready to be paid to the said *A B* if he will accept the same, and this he the said *C D* is ready to verify; wherefore he prays judgment if the said *A B* ought to have or maintain his aforesaid action against him to recover any more or greater damages than the said sum of —l. *parcel, &c. in this behalf, &c. And for a further plea in this behalf, as to all the said several supposed promises and undertakings in the said declaration mentioned,

* 433
Plea of set-off
to the sum not
tendered.(k)

(g) The " &c." is sufficient after the exception is once fully stated. entitle it specially, see *Tidd's Prac.* 3d edit. 369. or plead more specially.

(h) In *K. B.* it is advisable to say, "before the exhibiting of the bill," rather than "the commencement of the suit," in order to compel the plaintiff in some cases to reply a *latitat*, 1 *Wils.* 141. See *Sell. Prac.* 1st edit. vol. 2. appendix, G. as to the term "*ante exhibitionem billæ*."

(i) The real time is not in general material, but if the tender were after the first day of the term, and the declaration entitled generally, the defendant should compel the plaintiff to

(k) A plea of set-off is here given, because it is frequently pleaded with the plea of tender, in which case it varies in point of form in some trifling respects, from the usual plea of set-off. To avoid the expense of a rule to plead double, and in the length of the paper book, it is however, in general advisable to give notice of set-off, instead of pleading it, which notice is precisely similar in form to the precedent, *post*, 411.

Tender, &c. except as to the said sum of —*l.* parcel, &c. the said *C D* by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said *A B* ought not to have or maintain his aforesaid action thereof against him, because he says that the said *A B* before and at the time of exhibiting the bill of him the said *A B* against him the said *C D* in this behalf, (or, *if in C. P. or by original, "before and at the time of the commencement of this suit,"*) to wit, at, &c. aforesaid, was, and from thence hitherto hath been, and still is indebted to the said *C D* in a large sum of money, to wit, the sum of —*l.* of lawful money of *Great Britain*, for, &c. (*here state the subject matter of the set-off, as post, 442 to 448. and then proceed as follows :*) which said sum of money so due and owing from the said *A B* to the said *C D*, exceeds the damages sustained by the said *A B* by reason of the non-performance by him the said *C D* of the said severa supposed promises and undertakings in the said declaration mentioned, except as to the said sum of —*l.* parcel, &c. and out of which said sum of money so due and owing from the said *A B* to the said *C D*, he the said *C D* is ready and willing, and hereby offers to set off and allow to the said *A B* the full amount of the said damages except as aforesaid, according to the form of the statute in such case made and provided. And this he the said *C D* is ready to verify ; wherefore he prays judgment if the said *A B* ought to have or maintain his aforesaid action thereof against him, &c.

* 434

Accord and satisfaction, by delivery of a pipe of wine.
(1)

*[*Actio non, as ante, 421. first precedent to the obelisk,*] because he says, that after the making of the said several promises and undertakings in the said declaration mentioned, and before the exhibiting of the bill of the said *A B* against him the said *C D* in this behalf, (*or if by original or in C. P. "before the commencement of this suit,"*) to wit, on, &c. at, &c.

(1) As to accord and satisfaction in general, see *Bac. Abr. tit. Accord and Satisfaction. Com. Dig. tit. Accord.* Accord and satisfaction may be given in evidence under the general issue, 1 *Ld. Raym.* 566. 12 *Mod.* 376. and it is seldom pleaded otherwise than as a sham plea for delay.

aforsaid, he the said *C D* delivered to the said *A B* one pipe of wine, of great value, to wit, of the value of 100*l.* in full satisfaction and discharge of the said several promises and undertakings in the said declaration mentioned, and which said pipe of wine he the said *A B* then and there accepted and received of and from the said *C D* in full satisfaction and discharge of the said several promises and undertakings, in the said declaration mentioned. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*] *Accord and satisfaction.*

[*Action non, as ante, 421. first precedent to the obelisk.*] because he says, that after the making of the said several promises and undertakings in the said declaration mentioned, and before the exhibiting of the bill of the said *A B* against him the said *C D* in this behalf, (*or if by original, or in C. P. "before the commencement of this suit,"*) to wit, on, &c. at, &c. aforsaid, he the said *C D* made and sealed and as his act and deed delivered to the said *A B*, his the said *C D*'s certain writing obligatory in the penal sum of 1,000*l.* of lawful money of *Great Britain*, conditioned for the payment of 500*l.* of like lawful money, and interest for the same by the said *C D* to the said *A B* at a certain time therein mentioned, and now elapsed, and which said writing obligatory the said *C D* then and there delivered to the said *A B*, and the said *A B* then and there accepted and received the same of and from the said *C D* in full satisfaction and discharge of the said several promises and undertakings in the said declaration mentioned, and of all damages and sums of money thereupon due and owing, or accrued. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*] *The like of a bond given in satisfaction.*

* 435

[*Action non, as ante, 421. first precedent to the obelisk.*] because he says that after the making of the said promises and undertakings in the said declaration mentioned, and before the *Account stated, and delivery and acceptance of defendant's promissory note. (m)*

(*m*) This plea is sustainable, 5 T. R. 513. It is generally adopted as a sham plea, particularly where the plaintiff has declared only on the common

counts, and a note or bill has been given but not paid when due, so as to put the plaintiff to shew in his replication that the note was not paid, &c.

Accord and satisfaction.

exhibiting of the bill of the said *A B* against him the said *C D* in this behalf, (or if in *C. P.* or by original, "*before the commencement of this suit,*") to wit, on, &c. at, &c. aforesaid, an account was had and stated by and between the said *A B* and the said *C D*, of and concerning the said several sums of money in the said declaration mentioned, and upon that occasion he the said *C D* was then and there found in arrear, and indebted to the said *A B* in the sum of —*l.* † for which said sum of —*l.* he the said *C D* then and there made and delivered to the said *A B*, his certain promissory note in writing, bearing date the day and year last aforesaid, whereby he the said *C D* promised to pay to the said *A B* or his order, two months after the date thereof, the said sum of —*l.* wherein he the said *C D* was so found in arrear and indebted to the said *A B* as aforesaid, and the said *A B* then and there accepted and received the said note for and on account of the said sum of money in the said declaration mentioned, and by reason thereof he the said *C D* then and there became, and still is, liable to pay the said sum of —*l.* in the said promissory note mentioned, according to the tenor and effect of the said note. *And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

* 436

The like that defendant accepted a bill of exchange payable to a 3d person. (n)

[*Same as the last to the obelisk.*] For which said sum of —*l.* the said *A B* afterwards, to wit, on, &c. at, &c. aforesaid, according to the usage and custom of merchants, made his certain bill of exchange in writing, bearing date the day and year last aforesaid, and then and there directed the said bill of exchange to the said *C D*, and thereby required the said *C D* two months after the date thereof, to pay to *E F*, or his order, the sum of —*l.* for value received, and then and there delivered the said bill of exchange to the said *E F*, which said bill of exchange the said *C D* afterwards, to wit, on, &c. last aforesaid, t, &c. aforesaid, upon sight thereof accepted, according to the said usage and custom of merchants, for and on account of the said several promises and undertakings in the said declaration mentioned; and by reason thereof, and according to the said usage and custom of merchants, he the said *C D* then and

(n) See the note to the last precedent.

there became, and was and still is liable to pay to the said *E F*, Arbitrament.
 or his order, the said sum of money in the said bill of ex-
 change specified, according to the tenor and effect of the said
 bill of exchange, and of his said acceptance thereof. And this,
 &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

[*Action non, as ante, 421. first precedent to the obelisk.*]

Because he says, that after the making of the said several
 "promises and undertakings in the said declaration mentioned,
 and before the day of the exhibiting of the bill of the said *A B*
 against him the said *C D* in this behalf, (or if in *C. P.* or by
original, "before the commencement of this suit,") to wit, on,
 &c. at, &c. aforesaid, the said *A B* and the said *C D* submitted
 themselves (that is to say) by two mutual bonds of arbitra-
 tion, bearing date respectively the day and year last aforesaid,
 to the arbitration of, and engaged in all things well and truly
 to stand to, obey, abide, perform, fulfil, and keep the award,
 order, arbitrament, final end and determination of *E F* and
G H, arbitrators, indifferently elected and named, as well on the
 part and behalf of the said *A B* as of the said *C D*, to arbi-
 trate, award, order, judge and determine of and concerning all,
 and all manner of action and actions, cause and causes of action,
 suits, bills, bonds, specialties, judgments, executions, extents,
 quarrels, controversies, trespasses, damages and demands
 whatsoever, at any time theretofore had, made, moved, brought,
 commenced, sued, prosecuted, done, suffered, committed, or
 depending by and between the said parties, or either of them,
 so as the said award should be made by the said arbitrators,
 under their hands, and ready to be delivered to the parties in
 difference, or such of them as should desire the same on or
 before, &c. next; which time for making the said award was

Arbitrament
 and award. (o)

* 437

Time enlarg-
 ed.

(o) As to this plea in general, see Com. Dig. tit. Accord, D. Bac. Abr. Arbitrament, G. Arbitrament and award may be given in evidence under the general issue, *non assumpsit*; but it is frequently advisable to plead it, in order to compel the plaintiff in his replication to take issue on some particular part of the plea, and thereby admit the residue, see the precedents, 3 Wentw. Index, 8. Morgan's Prec. 233. 237. 508. Latw. 52. Clift. Ent. 195. Kydd on Awards, 2d edit. 465. Most of the precedents state the defendant's performance of the award; but this seems unnecessary, Kydd, 390. 392. 1 Ld. Raym. 122.

*Arbitrament.*Time further
enlarged.

* 438

The award.

afterwards, and before the time for making the same expired, to wit, on, &c. at, &c. aforesaid, by consent of the said *A B* and the said *C D*, enlarged until, &c. then next, and it was then and there agreed by and between the said *A B* and the said *C D*, that the award made before that time between them, should be binding and conclusive between them; which last-mentioned time for making the said award, was afterwards, and before the said enlarged term for making the said award had elapsed, to wit, on, &c. at, &c. aforesaid, by consent of the said *A B* and the said *C D*, further enlarged until, &c. then next, and it was then and there agreed between the said *A B* and the said *C D*, that the said award before that time made between *them, should be binding and conclusive between them. And the said *C D* further saith, that the said arbitrators, before the expiration of the said last-mentioned time limited for making their award, to wit, on, &c. at, &c. aforesaid, took upon themselves the burthen of the said arbitration, and having duly examined and considered the subject matters in dispute between the said *A B* and the said *C D*; they the said arbitrators did make their award, in writing under their hands, of and concerning the premises, and of and concerning the said promises and undertakings in the said declaration mentioned, and ready to be delivered to the said parties in difference, and did thereby then and there award that, &c. [*here set forth the award*] as by the said award bearing date, &c. reference being thereunto had, will more fully appear. (h) And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

*Judgment**recovered.*Judgment recovered in K.
B. C. P. or
Exchequer.

(g)

[*Actio non, as ante, 421. first precedent to the obelisk,*] because he saith that the said *A B*, heretofore, to wit, in —

(p) As to the averment of performance, see *ante*, 436. n. (o).

(q) A judgment recovered may be given in evidence under general issue, 2 *Str.* 733. 1 *Saund.* 67. 1. As to this plea, and the replication thereto, see 1 *Saund.* 92. n. 3. This plea is usually adopted for delay, in which case the judgment should be stated to have been recovered in a *different*

court to that in which the plea is pleaded, for if the recovery were pleaded in the same court, the plaintiff might, instead of replying, craveoyer of the record, or at least a note in writing of the term and number roll, and sign judgment if it were not given in convenient time. *Tidd's Prac.* 3d edit. 689,

term, in the — year of the reign of our said lord the king, *Judgment recovered.*
 in the court of our said lord the king, before the king himself,
 the same court then and still being holden at *Westminster*, in the
 county of *Middlesex*, [or if the plea be of a judgment recovered
 in the *Common Pleas*, say, "before Sir James Mansfield, knight,
 and his companions, then his majesty's justices of the bench at
Westminster, in the county of *Middlesex*;" or if in the *Exche-*
quer, *say, "before the barons of his majesty's court of *Exche-*
quer at *Westminster*, in the county of *Middlesex*,"] impleaded
 the said *C D* in a certain plea of trespass on the case on pro-
 mises, to the damage of the said *A B* of —*l.* for the not per-
 forming the very same identical promises and undertakings in
 the said declaration mentioned; and such proceedings were
 thereupon had in the said court in that plea, that afterwards,
 to wit, in that same. — term, the said *A B*, by the considera-
 tion and judgment of the said court, recovered in the said plea
 against the said *C D* —*l.* for his damages which he had sus-
 tained, as well on occasion of the not performing the same
 identical promises and undertakings, in the said declaration
 mentioned, as for his costs and charges by him about his suit
 in that behalf expended, whereof the said *C D* was convicted;
 as by the record and proceedings thereof still remaining in
 the said court of our said lord the king, before the king him-
 self, [or if in *C. P.* "of the bench aforesaid," or in the *Exche-*
quer, "of the *Exchequer* aforesaid,"] at *Westminster* afore-
 said, more fully and at large appears, which said judgment
 still remains in full force and effect, not in the least reversed,
 satisfied, or made void. And this, &c. [conclude with a verifi-
 cation by the record, as ante, 422. seventh precedent.]

* 439

[*Actio non*, as ante, 421. first precedent to the obelisk,] be-
 cause he says, that after the making of the said several pro-
 mises and undertakings in the said declaration mentioned, and

Release.
Release. (r.)

(r) A release may be given in evi-
 dence under the general issue, *Gilb.*
C. P. 64. *Doug.* 106, 107. 3 *Esp. Rep.*
 231. and in the case of a release con-
 tained in a composition deed by cre-
 ditors to an insolvent, it is not usual
 to plead it; it is, however, fre-
 quently adopted as a sham plea,
 and where a release has actually been
 executed in the usual form, it is fre-
 quently advisable to plead it, in order
 to narrow the evidence on the trial.

Release.

* 440

before the exhibiting of the bill of the said *A B* against him the said *C D* in this behalf, (or if in *C. P.* or by original, "before the commencement of this suit,") to wit, on, &c. (s) *at, &c. aforesaid, the said *A B* by his certain writing of release, sealed with his seal, and now shewn to the said court here, the date whereof is the day and year last aforesaid, [or if the release be pleaded as a sham plea, or if the deed have been lost, instead of the proferri, say, "which said writing of release having been lost and destroyed by accident, the said *C D* cannot produce the same to the said court here,"] did demise, release, and forever quit claim unto the *C D*, his heirs, executors, and administrators, the said several promises and undertakings in the said declaration mentioned, and each and every of them, and all sum and sums of money then due and owing, or thereafter to become due, together with all, and all manner of action and actions, cause and causes of action, suits, bills, bonds, writings obligatory, debts, dues, duties, reckonings, accounts, sum and sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, both at law and in equity, or otherwise howsoever, which he the said *A B* then had, or which he should or might at any time or times thereafter have, claim, allege, or demand against the said *C D*, for or by reason or means of any matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of the said deed or writing of release; as by the said deed or writing of release, reference being thereunto had, will fully appear. And this, &c. [conclude with a verification, as ante, 422. sixth precedent.]

*Set-off.**Plea of set-off.*

[*First Plea, general issue, as ante, 423. Second plea, actio non, as ante, 422. third precedent to the obelisk,*] and then proceed as follows: because he says, that the said *A B*, before, and at the time of the commencement of this suit, (t) to wit, at, &c. aforesaid, was and still is indebted to him the said *C D*, in a

(s) The date of the release, or any day, if the supposed release be pleaded, as a sham plea. (t) These words are necessary, s T. R. 186.

large sum of money, to wit, the sum of —*l.* of lawful money *Set-off*
of Great Britain, for [here state the subject matter of the set-off
according to the fact, the usual allegations are as in the pre-
cedents, post, 442 to 448. and when they do not apply, the set-
off may be stated as in the counts in indebitatus assumpsit, ante,
pages 5 to 70.] which said sum [or "sums"] of money, so
due and owing from the said *A B* to the said *C D* as afore-
said, exceeds [or "exceed"] the damages sustained by the
said *A B*, by reason of the non-performance by him the said
C D, of the said several supposed promises and undertakings,
in the said declaration mentioned, and out of which said sum
[or "sums"] of money, so due and owing from the said *A B*
to the said *C D*, he the said *C D* is ready and willing, and
hereby offers to set off and allow to the said *A B* the full
amount of the said damages, according to the form of the
statute in such case made and provided. And this, &c. [*con-*
clude with a verification, as ante, 422. sixth precedent.]

* 441

In the King's Bench, (or "C. P." or "Exchequer.")

— Term, 48 Geo. III,

C D } And the said *C D*, by *E F* his attorney, comes and de-
ats. } fends the wrong and injury, when, &c. and says, that he
A B. } did not undertake or promise in manner and form as the
said *A B* hath above thereof complained against him the said
C D, and of this he the said *C D* puts himself upon the
country, &c.

General issue,
and notice of
set-off. (u)

(u) In order to save the expense of a rule to plead double, and the additional expense in the length of the paper book, it is in general more advisable to give notice of set-off than to plead it, except where the debt on either side accrues by reason of a penalty contained in any bond or specialty, in which case the set-off must be pleaded, 8 Geo. II. c. 21. s. 4 2 Geo. II. c. 22. s. 13.

*Set-off.*The notice.
(w)*In the King's Bench, (or "C. P." or "Exchequer.")*

— Term, 48 Geo. III.

Between { *A B*, plaintiff,
 and
 C D, defendant.

Mr. ——— (the plaintiff's attorney.)

* 442

Take notice, that the above-named defendant on the *trial of this cause will give in evidence, and insist that the above-named plaintiff, before and at the time of the commencement of this suit, was and still is indebted to the said defendant in the sum of —l. of lawful money of Great Britain, for [here state the subject matter of the set-off, as in the following precedents, and precisely as in a plea of set-off, except that instead of the names of the parties, insert the words "plaintiff" and "defendant," and proceed as follows :] and that the said defendant will set off, and allow to the said plaintiff on the said trial, so much of the said sum of —l. so due and owing from the said plaintiff to the said defendant, against any demand of the said plaintiff, to be proved on the said trial, as will be sufficient to satisfy and discharge such demand, according to the form of the statute in such case made and provided.(x) Dated this — day of —, A. D. —.

Yours, &c.

E F, defendant's attorney.

Plea or notice
of set-off, in an
action by or
against as-
signees, ex-
ecutors, &c.

* In an action by or against assignees, executors, &c. the plea or notice of set-off, is nearly similar to the above precedents, and states that the bankrupt at the time of his bankruptcy, or the testator at the time of his death, was indebted, &c. (omitting the words, "before and at the time of the commencement of this suit, and still is,") and after setting forth the subject matter of the debt in the usual form, alleges, "which said sum of money is still wholly unpaid and unsatisfied, and the said plaintiffs as assignees (or as "executors") as aforesaid, before and at the time of the commencement of this suit, were and still are indebted to

(w) The pleader, in preparing the notice of set-off, subscribes it at the foot of the general issue, or other pleas; but the notice is a practical

proceeding, and does not appear upon the record.

(x) 2 Geo. II. c. 22. s. 13.

the said *C D* in the amount thereof." The plea or notice is to *Set-off*. conclude in the usual form, as in the above precedents.

[Commencement and conclusion of the plea or notice of **set-off* as *ante*, 440 to 442.] Upon and by virtue of a certain judgment which he the said *C D*, heretofore, to wit, in — term, in the — year of the reign of our said lord the king, in the court of our said lord the king, before the king himself, (or if in *C. P.* say, "before his majesty's justices of the bench at Westminster, in the county of Middlesex.") recovered, against the said *A B* in a certain plea of trespass on the case, upon promises, whereby it was considered and adjudged, that the said *C D* should recover against the said *A B* the said sum of — l. for his damages which he had sustained, as well by reason of the not performing of certain promises and undertakings before then made by the said *A B* to the said *C D*, as for his costs and charges by him about his suit in that behalf expended, (z) whereof the said *A B* was convicted, as by the record and proceedings thereof remaining in the said court of our said lord the king, before the king himself, (or in *C. P.* "in the said court of our said lord the king of the bench aforesaid,") more fully appears, which said judgment still remains in full force and effect, not reversed, annulled, discharged, satisfied, or made void.

Set-off on a judgment. (y)
* 443

[Commencement and conclusion of plea or notice of *set-off*, as *ante*, 440 to 442.] Upon and by virtue of a certain recognisance, he the said *A B* having, before the commencement of this suit, to wit, in — term, in the — year of the reign of our said lord the king, come in his own proper person into the court of our said lord the king, before the king himself, the said court then and still being holden at Westminster, in

On a recognisance in another court, and on simple contract.

(y) See the precedents, 3 Wentw. 160, 161. 1 T. R. 557. 22 vol. MSS. 461, 324. and the replication thereto. of the plea is not by the record, but as *ante*, 422. sixth precedent.
(z) The judgment is to be described according to the fact, see the precedents, *ante*, 181 to 183.

Set-off.

the county of *Middlesex*, (or if in the *Common Pleas*, see the form, ante, 179.) and then and there in the said court acknowledged himself to owe to the said *C D* the sum of —*l.* of *lawful money of *Great Britain*, to be paid to the said *C D*, when he the said *A B* should be thereunto afterwards requested, which said sum of —*l.* he the said *A B* for himself and his heirs, then and there consented and granted should be made of his and their lands, goods and chattels, and should be levied to the use and behoof of the said *C D*, (or if in *C. P.* see the form, ante, 179.) and which said recognisance is still in full force, strength and effect, not paid off, annulled, or satisfied, as by the said recognisance remaining of record in the said court of our said lord the king, before the king himself, will fully appear. And the said *C D* further saith, that the said *A B* at the time of the exhibiting of the bill of him the said *A B* against him the said *C D* in this behalf, at, &c. aforesaid, was and still is indebted to him the said *C D* in the further sum of —*l.* of like lawful money, for, &c. [set-off on money counts, as just, 446. and conclude the plea or notice of set-off, as ante, 441, 442.]

On simple contract.

For rent due on a lease. (a)

[Commencement and conclusion of plea or notice of set-off, as ante, 440 to 442.] Upon and by virtue of a certain indenture of lease, made heretofore, to wit, on, &c. at, &c. aforesaid, between the said *C D* of the one part, and the said *A B* of the other part, (the counterpart of which said indenture, sealed with the seal of the said *C D*, the said *C D* now brings here into court, the date whereof is the day and year last aforesaid,) whereby the said *C D* demised certain tenements, with the appurtenances therein mentioned, to the said *A B* for a certain term of years therein mentioned, to wit, for the term of — years, from, &c. yielding and paying, during the said term, the yearly rent or sum of —*l.* on certain days therein-mentioned, *to wit, on, &c. and in and by which said indenture, he the said *A B* covenanted with the said *C D* to pay him the said rent of —*l.* on the days aforesaid, of which said rent, afterwards, to wit, on,

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(a) If rent be due on a lease, the set-off should not be for use and occupation, but as above. See Bull. N. P. 179. Tidd's Prac. 3d edit. 607.

&c. a large sum of money, to wit, the said sum of —l. for — Set-off.
years of the said term then elapsed, became, and was, and
still is, in arrears and unpaid, from the said *A B* to the said
C D, to wit, at, &c. aforesaid.

[*Commencement and conclusion of plea of set-off, as ante, 440.* Set-off on a
441.] Upon and by virtue of a certain writing obligatory bond.(b)
made by the said *A B* heretofore, to wit, on, &c. at, &c. afore-
said, and sealed with his seal, and now shewn to the court of
our said lord the king, before the king himself, (or in *C. P.*
“to his majesty’s justices here,”) the date whereof is the same
day and year last aforesaid, whereby he the said *A B* became
held and firmly bound unto the said *C D* in the penal sum of
—l. of like lawful money, to be paid to the said *C D* when
he the said *A B* should be thereunto afterwards requested,
which said writing obligatory was and is conditioned for the
payment of a certain sum of money, to wit, the sum of —l. at
a certain time therein mentioned, and which had elapsed be-
fore the commencement of this suit, and which said writing
obligatory at the time of the commencement of this suit, was
and still is in full force and effect, not released, paid off, satis-
fied, cancelled, or otherwise made void, and at the time of the
commencement of this suit, there was and still is due and owing
from the said *A B* to the said *C D*, upon the said writing obli-
gatory, by the condition thereof, a certain sum of money, to wit,
the said sum of —l. (the sum first alleged to be due,) to wit, at,
&c. aforesaid. * 446

[*Commencement and conclusion of plea, or notice of set-off, as* On a bill ac-
ante, 440 to 442.] Upon and by virtue of a certain bill of ex- cepted by
change, bearing date the — day of —, *A. D.* —, here- plaintiff.(b)

(b) See the precedent, 1 Wils. 155.
5 T. R. 133. When the debt on
either side accrues by reason of a pe-
nalty contained in any bond or spe-
cialty, the set-off must be *pleaded*,
and the sum really due, must be sta-
ted in the plea, 8 Geo. II. c. 24. s. 4.
2 Geo. II. c. 22. s. 13. 3 T. R. 65.
6 T. R. 460.

(b) The forms of set-off on bills of
exchange and promissory notes, which
most usually occur are here given.
If they do not apply, see other forms
in my treatise on bills, 2d edit. 325
to 356. and the Index, page 413, 414.
from which the plea or notice of set-
off may be framed.

Set-off.

tofore, to wit, on the day and year last aforesaid, at, &c. aforesaid, made and drawn by the said *C D*, upon and then and there accepted by the said *A B*, whereby he the said *C D* requested the said *A B*, two months after the date thereof, to pay to him the said *C D* or his order, the sum of —*l.* for value received.

On a bill indorsed by plaintiff to defendant. (b)

[Commencement and conclusion of plea; or notice of set-off, as ante, 440 to 442.] And also in the further sum of —*l.* of like lawful money, upon and by virtue of a certain other bill of exchange, bearing date the — day of —, *A. D.* —, heretofore, to wit, on the day and year last aforesaid, at, &c. aforesaid, made and drawn by the said *A B* upon one *E F*, whereby he the said *A B* requested the said *E F*, two months after the date thereof, to pay to him the said *A B* or his order, the sum of —*l.* for value received, which said bill of exchange the said *A B*, afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, indorsed and delivered to the said *C D*, and which said bill of exchange, when the same became due and payable, according to the tenor and effect thereof, to wit, on, &c. at, &c. aforesaid, was presented and shewn to the said *E F* for payment thereof, but the said *E F* then and there neglected and refused to pay the said sum of money in the said bill of exchange specified, whereof the said *A B* afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, had notice.

* 447

On a promissory note made by plaintiff. (b).

*[Commencement and conclusion of plea, or notice of set-off, as ante, 440 to 442.] And also in the further sum of —*l.* of like lawful money, upon and by virtue of a certain promissory note in writing, bearing date the — day of —, *A. D.* —, heretofore, to wit, on the day and year last aforesaid, at, &c. aforesaid, made by the said *A B*, and whereby he the said *A B* then and there promised to pay, two months after the date thereof, to the said *C D* or his order, the sum of —*l.* for value received.

(b) *Ante*, 445. n. (b).

(b) *Ante*, 446. n. (b).

[Commencement and conclusion of plea, or notice of set-off, as ante, 440 to 442.] And also for the further sum of —l. of like lawful money, upon and by virtue of a certain promissory note in writing, bearing date the — day of —, A. D. —, heretofore, to wit, on the day and year last aforesaid, at, &c. aforesaid, made by one *E F*, and whereby he the said *E F* then and there promised to pay, two months after the date thereof, to the said *A B* or his order, the sum of —l. for value received, and which said promissory note, he the said *A B*, afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, indorsed and delivered to the said *C D*, and which said promissory note, when the same became due and payable, according to the tenor and effect thereof, to wit, on, &c. at, &c. aforesaid, was presented and shewn to the said *E F* for payment thereof, but the said *E F* then and there neglected and refused to pay the said sum of money in the said promissory note specified, whereof the said *A B*, afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, had notice.

Set-off.

On a promissory note indorsed by plaintiff to defendant. (b)

[Commencement and conclusion of plea, or notice of set-off, as ante, 440 to 442.] For the use and occupation of a certain dwelling-house, buildings and land, with the appurtenances of the said *C D* by the said *A B*, and at his *special instance and request, and by the sufferance and permission of the said *C D* for a long time then elapsed, had held, used, occupied, possessed and enjoyed; and also for the work and labour, care, diligence and attendance of the said *C D*, by him the said *C D*, and his servants, before that time done, performed and bestowed, in and about the business of the said *A B*, and for the said *A B*, and at his request, and for divers materials and other necessary things by the said *C D* before that time found and provided, and used and applied in and about the said work and labour for the said *A B* at his like request; and also for divers goods, wares and merchandises, sold and delivered by the said *C D* to the said *A B* at his like request; and for money by the said *C D* before that time lent and advanced to, and paid, laid out

For use and occupation. (c)

* 448

Work and labour, and materials.

Goods sold.

Money counts and interest, and account stated.

(b) Ante, 446. n. (b).

ante, p. 8. If the rent be due on a

(c) See the form in a declaration, lease, the form must be as ante, 444.

By executor, &c. executor of the last will and testament of the said *E F*, deceased, nor ever administered⁽ⁱ⁾ any of the goods and chattels which were of the said *E F*, deceased, at the time of his death as executor of the last will and testament of the said *E F*, deceased, in manner and form as the said *A B* hath above in his said declaration in that *behalf alleged. And this, &c. [conclude with a verification,^(k) as ante, 422. sixth precedent.]

* 451

Defendant ne anques administrator.^(l) [First, general issue. Second, *actio non*, as ante, 421. third precedent.] Because he says that he is not, nor ever hath been administrator of the goods or chattels, rights or credits, which were of the said *E F*, deceased, in manner and form as the said *A B* hath above, in his said declaration in that behalf alleged. And this, &c. [conclude with a verification, as ante, 422. sixth precedent.]

Plene administravit.^(m) First, general issue,⁽ⁿ⁾ as ante, 423. Second, *actio non*, as ante, 421. third precedent.] Because he says, that he hath fully administered all and singular the goods and chattels which were of the said *E F*, deceased, at the time of his death, and which have ever come to the hands of him the said *C D*, as executor, (or "as administrator,") as aforesaid, to be ad-

issue, and with *plene administravit*, &c. Fortesc. 336. Com. Dig. Pleader, F. 2. If there be any doubt whether the defendant may not have made himself executor *de son tort*, it is dangerous to plead this plea, because it may render the defendant personally liable for the debt and costs, though he may not have assets to the amount. 1 Saund. 336. b. n. 10.

(i) This seems proper, because a person who has wrongfully administered, may be sued as an executor generally. 1 Saund. 265. n. 2.

(k) It is usual to conclude this plea with a verification. It should seem, however, that as the subject matter of it is a denial of an allegation in the declaration, it might conclude to the country.

(l) See the notes to the last precedent. This is a good plea in bar. Com. Dig. Pleader, 2 D. 13. And as a person cannot be sued as administrator *de son tort*, it is not necessary in this plea, to aver that the defendant never administered, 6 T. R. 551.

(m) If the defendant have any assets in hand, he should plead *plene administravit præter* as in the precedent, post, 452.

(n) If it be apprehended that the plaintiff will not deny the plea of *plene administravit*, but will take judgment of assets, *quando acciderint*, it is advisable, in order to avoid the costs of withdrawing the plea of general issue, not to plead it, unless there be some sufficient ground on which the plaintiff's demand may be disputed, 2 Bl. Rep. 1275. 1 Saund. 336. b.

administered, to wit, at, &c. aforesaid, and that he the said *C D* hath not nor on the day of exhibiting the bill of the said *A B* in this behalf, (or if in *C. P.* or by original, "at the time of the commencement of this suit,") or at any time since had any goods or chattels which were of the said *E F* deceased, at the time of his death, in the hands of him the said *C D* as executor, (or "as administrator,") as aforesaid, to be administered. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

By executor
&c.

* 452

*[*Actio non, as ante, 421. first precedent.*] except as to the sum of —*l.*(*p*) because he says, that the said *C D* hath fully administered all and singular the goods and chattels which were of the said *E F* deceased, at the time of his death, and which have ever come to the hands of him the said *C D* to be administered, except goods and chattels of the value of —*l.* (or except the said sum of —*l.*) to wit, at, &c. aforesaid, and that he the said *C D* hath not, nor on the day of exhibiting the bill of the said *A B* in this behalf, (or if in *C. P.* or by original, "at the time of the commencement of this suit,") or at any time since, had any goods or chattels which were of the said *E F* deceased, at the time of his death, in his hands to be administered, except the said goods and chattels of the value aforesaid; (or of the said sum of —*l.*)(*p*) and this he the said *C D* is ready to verify; wherefore he prays judgment if the said *A B* ought to have or maintain his aforesaid action thereof against him the said *C D*, except as to the said sum of —*l.* &c.

Plene admin-
istravit præ-
ter.(o)

(o) See the precedents, *Rast. Ent.* 323. a. 3 *Wentw.* 211. 214.

(p) Some of the precedents pray judgment generally, *Rast. Ent.* 323. 3 *Wentw.* 211. others do not commence, but only conclude with a prayer of judgment, except as to the assets acknowledged, 3 *Wentw.* 211. 214. The latter precedent also brings the money into court, but this is un-

necessary, for the assets confessed may be goods or a leasehold interest, not capable of being brought into court. The same precedent also admits a liability to costs, but this is incorrect, for if the plea be true, the defendant is not liable to costs. *Tidd's Prac.* 3d edit. 894. n. 1. 1 *Saund.* 336. b.

*By executors,
&c.*

Plea of retain-
er by an exe-
cutor. (g)

* 453

On a bond.

On a simple
contract debt.

Defendant ap-
pointed exe-
cutor, &c.

[*First, general issue, as ante, 423. 2dly. plene administravit, as ante, 451. 3dly. actio non, as ante, 421. third precedent.*] Be-
cause he says, that the said *E F* in his life-time, *to wit, on
the — day of —, *A. D.* —, at, &c. aforesaid, by
his certain writing obligatory, sealed with his seal, and now
shewn to the court here, the date whereof is the day and year
last aforesaid, acknowledged himself to be held and firmly
bound unto the said *C D* in the sum of —*l.* of lawful money
of *Great Britain*, to be paid to him the said *C D*, when he
the said *E F* in his life-time should be thereunto afterwards
requested, with a condition thereunder written, that if, &c.
(*here set out the condition,* (r) which said writing obligatory
was so made as aforesaid, for securing the payment of a just
debt, (s) and at the time of the death of the said *E F*, was and
still is in full force and effect, nor in the least reversed, satis-
fied, or otherwise vacated, and before and at the time of the
commencement of this suit, a large sum of money, to wit,
the sum of —*l.* payable to the said *C D*, under and by virtue
of the said writing obligatory, for principal and interest, was
and still is unpaid and unsatisfied to the said *C D*. (t) And
the said *C D* further saith, that the said *E F*, in his life-time,
and at the time of his death, was justly and truly indebted to
the said *C D*, in a large sum of money, to wit, the sum of
—*l.* of like lawful money, for, &c. (*here state the particulars
of the set-off on simple contract, as ante, 442 to 448.*) and which
said last-mentioned sum of money still remains wholly in arrear,
unpaid and unsatisfied to the said *C D*. And the said *C D*
further saith, that the said *E F* in his life-time, to wit, on, &c.
at, &c. aforesaid, duly made and published his last will and

(g) See the precedents, 1 Saund. 333. 3 Wentw. 219. 244. id. Index, 26 to 33. A retainer may be pleaded or given in evidence under the plea of *plene administravit*, 1 Brownl. 75. 3 Burr. 1380—1385. 2 Bl. Rep. 965. Co. Lit. 283. a. But it is in general advisable to plead it, in order to compel the plaintiff, by his replication, to admit either the retainer, or the insufficiency of the assets.

(r) When it is proper to state the condition of the bond in the plea, see 1 Saund 333. n. 7. 5 T. R. 309.

(s) In pleading a retainer on a bond debt, it is not necessary to aver that the bond was given for a just and true debt, 6 T. R. 550. 1 Saund. 330. n. 4. 333. n. 6.

(t) It seems proper in all cases to shew how much is due on the bond, 5 T. R. 309. 1 Saund 333. n. 7.

*testament(u) in writing, and thereby constituted and appointed the said *C D* executor thereof, and afterwards, to wit, on the — day of —, *A. D.* —, at, &c. aforesaid, the said *E F* died, without revoking or altering his said will; after whose death the said *C D* duly proved the said will, and took upon himself the burthen of the execution thereof, to wit, at, &c. aforesaid; and the said *C D* further saith, that he hath fully administered all and singular the goods and chattels which were of the said *E F* at the time of his death, and which have ever come to the hands of him the said *C D* to be administered, except goods and chattels of small value, to wit, of the value of 10*l.*(x) and that he hath not, nor on the day of exhibiting the bill aforesaid, (or if in *C. P.* or by original, "at the time of the commencement of this suit,") or at any time afterwards, had any goods or chattels which were of the said *E F* deceased, at the time of his death, except the said last-mentioned goods and chattels, of the value aforesaid, which are not sufficient to pay or satisfy the monies due and owing to the said *C D* as aforesaid, and which he the said *C D* retains in his hands, towards and in part satisfaction and payment thereof, and this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

[*Actio non, as ante, 421. first precedent.*] Because he says, that one *G H* heretofore, and in the life-time of the said **E F*, to wit, in(z) — term, in the — year of the reign of our

Judgment recovered against testator, an outstanding bond, and a judgment against defendant.(y)

* 455

(u) In an action against an administrator, it is not necessary, in his plea of retainer, to state the letters of administration; 6 T. R. 550. but it is otherwise in the case of an executor, who pleads a retainer in that character, 1 Mod. 208. but see 6 T. R. 550. 2 Stra. 1106. and therefore the above allegation of the will and appointment of the defendant as executor, is in general advisable; and if in an action against a person sued as executor, he plead a retainer as administrator, the letters of administration should be stated, Sir T. Jones, 23. 6 T. R. 551.

(x) Some value ought to be stated, though the precise amount is neither material nor traversable, 1 Saund. 333. n. 7.

(y) See the precedents, 3 Wentw. Index, 26 to 33. 1 Saund. 329 to 339. Lutw. 446, 447. Lil. Ent. 159. 111. and as to the form of a plea of this nature in general, 1 Saund. 329 to 339. in the notes.

(z) The plea must state the term and year when, and the court in which the judgment was obtained, 1 Saund. 329. n. 1. and as to the mode of stating a judgment recovered against the deceased, *id.* *ibid.* n. 2.

By executors,
 &c.
 Judgment a-
 gainst deces-
 sed.

Bond out-
 standing.

Judgment a-
 gainst defend-
 ant.(c)

* 456

lord the now king, in the court of our said lord the king, be-
 fore the king himself, [state the recovery of the judgment
 against the deceased in King's Bench, Common Pleas, or Exche-
 quer, whether in *assumpsit* or debt, &c. precisely as in the pre-
 cedents, ante, 181 to 183. and conclude as in those precedents,
 with a reference to the record, and an allegation that the judg-
 ment is still in force; see the precedent in 1 Saund. 329. and
 then proceed as follows:—] And the said *C D* further saith, that
 the said *E F* in his life-time, to wit, on, &c. at, &c. aforesaid,
 by his certain writing obligatory, sealed with his seal, became
 held, and firmly bound unto one *J K* in the sum of —*l.* of
 lawful money of Great Britain, to be paid to the said *J K*,
 when he the said *E F* should be thereto afterwards requested,
 which said writing obligatory was so made as aforesaid, for
 securing the payment of a just debt,(a) and at the time of the
 death of the said *E F*, was and still is in full force and effect,
 not in any wise cancelled, annulled, paid off, or satisfied, and
 before and at the time of the commencement of this suit,
 there was and still is due and owing to the said *J K*, upon
 and by virtue of the said writing obligatory, a large sum of
 money, to wit, the sum of —*l.* to wit, at, &c. aforesaid.(b) And
 the said *C D* further saith, that one *L M*, after the death *of
 the said *E F*, to wit, in — term, in the — year of the
 reign of our lord the now king,(d) by bill without the writ of

(a) This allegation is usual, though it is not necessary. If the debt were not a just one, the plaintiff might shew it in his replication, 1 Saund. 330. n. 4. 333. n. 6.

(b) The defendant may plead the penalty as the outstanding debt, or may shew what is really due, and the latter mode is recommended; and sometimes it is proper to set forth the condition of the bond, as ante, 453. 5 T. R. 309. 1 Saund. 333. n. 7.

(c) As to the mode of pleading a judgment against the defendant as executor or administrator, see 1 Saund. 329. n. 3. 330. n. 4. 331. n. 5. Formerly it was the practice in all cases, to set forth the bond or other

debt upon which the judgment was founded, and the pleadings in the action, 1 Saund. 329. n. 3. but the present mode of pleading in *assumpsit*, a judgment obtained against an executor or administrator is as above, 1 Saund. 331. n. 5. and it is not necessary to state the declaration or pleadings in the action; but in a plea to an action of debt on *specialty*, it is still necessary to shew that the debt on which the judgment was recovered was a specialty, or to aver, that the judgment was recovered before the defendant had notice of the plaintiff's demand, see 1 T. R. 690.

(d) This is necessary, see ante, 455. n. (x).

our said lord the king, impleaded the said *C D* as executor, *By executors, &c.* of the last will and testament of the said *E F*, deceased, [or "*as administrator of all and singular the goods and chattels, rights and credits which were of the said E F, at the time of his death, who died intestate,*"] in the court of our said lord the king, before the king himself, at *Westminster*, in the county of *Middlesex*, in a certain plea of debt,^(e) for the sum of —*l* due and owing to the said *L M* from the said *E F* in his life-time, and at the time of his decease, and such proceedings were thereupon had in the said court of our said lord the king, before the king himself, at *Westminster* aforesaid, in that plea, that the said *L M*, afterwards, to wit, in that same — term, in the — year aforesaid, by the consideration and judgment of the said court, recovered against the said *C D*, as executor, (or "*as administrator,*") as aforesaid, his said debt of —*l*. and also —*l*. which by the same court were adjudged to the said *L M* for his damages which he had sustained, as well on occasion of the detaining of that debt, as for his costs and charges, by him about his suit in that behalf expended, to be levied of the goods and chattels, which were of the said *E F*, at the time of his death, in the hands of the said *C D* to be administered, if he had so much thereof in his hands to be administered, and if *he had not so much thereof in his hands to be administered, then the sum of —*l* parcel of the damages aforesaid, being the amount of the costs and charges aforesaid, to be levied of the proper goods and chattels of the said *C D*. Whereof the said *C D* was convicted, as by the record and proceedings thereof remaining, in the said court of our said lord the king, before the king himself, at *Westminster* aforesaid, more fully appears. Which said judgment so had and obtained as aforesaid, was had and obtained for a true and just debt, due and owing to the said *L M*, from the said *E F* in his life-time, and at the time of his death,^(f) and still remains in

* 457

(e) The judgment is to be described according to the fact, whether in *assumpsit*, debt, or covenant, see the mode of stating the judgment, *ante*, 455.

(f) This is not necessary, see *ante*, 455. n. (a).

*My executors,
&c.*

*Plene admin-
istravit præ-
ter.*

full force and effect, not in any wise reversed, annulled, discharged, or satisfied ;(g) and before and at the time of the commencement of this suit, there was and still is due and owing to the said *L M*, upon and by virtue of the said last-mentioned judgment, a large sum of money, to wit, the sum of —*l.* to wit, at, &c. aforesaid.(h) And the said *C D* further saith, that he hath fully administered all and singular the goods and chattels which were of the said *E F* deceased, at the time of his death, which have ever come to his hands to be administered, except goods and chattels of small value, to wit, of the value of 10*l.*(i) and that he the said *C D* hath not, nor on the day of the exhibiting the bill of the said *A B* in this behalf, (or in *C. P.* or by original, “at the time of the commencement of this suit,”) or at any time since, had any goods or chattels, which were of the said *E F* at the time of his death, in his hands to be administered, except the said goods and chattels of the value aforesaid, which are not sufficient to satisfy the several debts aforesaid, due and owing on the said judgments, and writing obligatory, (according to the *fact*,) and which are subject and liable to satisfy the said several debts. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*(k)]

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(g) This is unnecessary, 1 Saund. 330. n. 4.

(h) As to this allegation, *ante*, 453. n. (t), 455. n. (b).

(i) As to this allegation, see *ante*, 454. n. (x).

(k) Formerly this plea was concluded with an averment of the intestate's being the same person as mentioned in the bond and record of judgment, but it is not material, and is now omitted, 1 Saund. 334. n. 8.

*PLEAS IN DEBT.

In the King's Bench, (or "C. P." or "Exchequer.")

— Term, 48 Geo. III.

General issues, &c.

C D } And the said *C D*, by *E F* his attorney, comes and de- *Nil debet ge-*
ats. } fends the wrong and injury, when, &c. and says, that he *nerally. (a)*
AB. } does not owe the said sum of money, (or "*the said sum of*
 — *l.*") (*b*) above demanded, or any part thereof, in manner and
 form as the said *AB* hath above thereof complained against
 him, and of this he the said *C D* puts himself upon the
 country, &c.

C D } And the said *C D*, by *E F* his attorney, comes and de- *Nil debet in*
ats. } fends the wrong and injury, when, &c. and says, that *debt, qui tam.*
AB.(c) } he does not owe to (*e*) our said lord *the king, (or "*to the poor*
 of the said parish of —, in the county aforesaid,") and to the *(d)*
 said *AB* who sues as aforesaid, or to either of them the said

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(a) As to this plea in general, see judgment, as for want of a plea, 3 B.
ante, vol. 1. Index, tit. *Nil Debet.* It & P. 174.
 is a proper plea to debt on simple
 contract, or for an escape, or on a
 penal statute, or when the deed is
 mere inducement to the action, but
 not when the action is founded on a
 specialty, as on a bail-bond, &c. or on
 a record, *Ld. Raym.* 1500. *Com.*
Dig. Pleader, 2 W. 17.

(b) If the sum be specified, care
 must be taken that the plea applies to
 all the sums demanded; thus where a
 declaration in debt demanded 2,000*l.*
 and contained several counts, each
 of which stated a debt of 224*l.* and
 the defendant pleaded that he did
 not owe the said sum of 224*l.* it was
 decided that the plaintiff might sign

(c) It is sufficient in a *qui tam*
 action, to entitle the plea with the
 names of the parties, without the ad-
 dition of "*qui tam*," *Esc.* to the plain-
 tiff's name, 7 East, 333.

(d) See the precedents, 1 Wentw.
Index, 632, 633.

(e) The plea in this respect should
 be conformable to the declaration,
 and where, in an action *qui tam*, the
 plea stated that the defendant did not
 owe to the plaintiff, omitting "and to
 our lord the king," it was held insuffi-
 cient, *Hob.* 328. *Bac. Abr.* Action,
qui tam, D. and Reg. Plac. 302. but it
 would be sufficient to say he doth not
 owe generally, *modo and forma*, &c.
 without specifying to whom.

General issue, &c.

sum of money, (or "the said sum of —.") ^(f) above demanded, or any part thereof, in manner and form as the said *A B*, who sues as aforesaid, hath above thereof complained against him, and of this he puts himself upon the country, &c.

Non est factum. (g)

C D } And the said *C D*, by *E F* his attorney, comes and defends the wrong and injury, when, &c. and says, that the said *supposed* ^(h) writing obligatory, (or "indenture," or "articles of agreement," according to the fact,) is not his deed, &c. and of this he puts himself upon the country, &c.

The like by an executor or administrator. (i)

C D } And the said *C D*, executor (or "administrator," as aforesaid, by *E F* his attorney, comes and defends the wrong and injury, when, &c. and says, that the said writing obligatory, (or "indenture," or "articles of agreement," &c. according to the fact,) is not the deed of the said *G H*, deceased, and of this he puts himself upon the country, &c.

Non est factum, after craving oyer of bond and condition. (k)

* 461

C D } And the said *C D*, by *E F* his attorney, comes *A B*. } and defends the wrong and injury, when, &c. and craves oyer of the said *supposed* ^(l) writing obligatory, in the said declaration mentioned, and it is read to him, ^(m) &c. he

(f) *Ante*, 459. note (b).

(g) When this plea is necessary or proper, see *ante*, vol. 1. Index, tit. *Non est factum*, 2 Ld. Raym. 1500. Com. Dig. Pleader, 2 W. 18.

(h) When the defendant means to dispute the validity of the deed, it should seem that the plea should refer to it merely by the term "writing" or "supposed writing obligatory," "indenture," &c. and should not say "writing obligatory," &c. generally, because such admission would be inconsistent with the proposed defence, 1 Saund. 291. a. n. 1. See the precedents, Lil. Ent. 166. Co. Ent. 145. b. Rast. Ent. 181. b. 182. a. 10 Co. 126. b. Lutw. 464—467. which say only "writing."

(i) As to this plea, see Com. Dig.

Pleader, 2 W. 3. 10. Co. 120.

(k) It is not usual to plead *non est factum*, setting out the condition on oyer unless where the defendant pleads double.

(l) *Vide ante*, 460. n. (h).

(m) Though it is usual in practice not to set forth the bond, but to say, "and it is read to him," &c. and then to pray oyer of the condition, and set it forth in *hec verba*, yet it is said that regularly the bond ought to be entered at large, as well as the condition, but if no use is intended to be made of the bond in pleading, there is no occasion to crave oyer of it at all, or to enter any such prayer, for it is sufficient to pray oyer of the condition only, 1 Saund. 9. b. n. 1.

also craves *oyer* of the condition of the said supposed writing obligatory, and it is read to him in these words: Whereas, &c. *(here set forth the condition, with the recital, if any, verbatim)*(n) which being read and heard, the said *C D* says, that the said supposed writing obligatory, is not his deed, and of this he puts himself upon the country, &c.

General issues, &c.

C D } And the said *C D* by *E F* his attorney, comes and de-
ats. } fends the wrong and injury, when, &c. and craves *oyer*
A B. } of the said supposed(h) indenture, in the said declaration mentioned, and it is read to him in these words, *(here set out the indenture verbatim)* which being read and heard, the said *C D*, says that the said supposed indenture is not his deed, and of this he puts himself upon the country, &c.

The like of an indenture.(o)

C D } And the said *C D* by *E F* his attorney, comes and de-
ats. } fends the wrong and injury, when, &c. and as to the
A B. } said first count of the said declaration, says that *the said supposed(q) writing obligatory therein mentioned, is not his deed, and upon this he puts himself upon the country, &c. and as to the said 2d, 3d, 4th, and last counts of the said declaration, the said *C D* says that he does not owe the said sums of money therein mentioned, or any or either of them, or any part thereof, in manner and form as the said *A B* hath above thereof complained against him, and of this he puts himself upon the country, &c.

Non est factum, and nil debet, to debt on bond and simple contract.

* 462

(n) The whole condition or deed *est factum*, is only customary when must be set forth upon *oyer*, and if the defendant also pleads a special there be any misrecital, the plaintiff plea, and it may be necessary for the may either sign judgment as for want defendant to avail himself of the non-performance by the plaintiff of some of a plea, or he may by his replication condition precedent, &c. as a ground pray that the deed may be enrolled, and procure it to be enrolled and demur, 1 Saund. 9. b. n. l. 4 T. R. 370.

(p) *Ante*, 460. n. (h).

(o) See the notes to the last precedent. This mode of pleading *non*

(q) *Ante*, 460. n. (h).

General issues, &c.

Onerari non.
(r)

C D } And the said *C D* by *E F* his attorney, comes and defends the wrong and injury, when, &c. and says that he ought not to be charged with the said debt, by virtue of the said supposed(s) writing obligatory, (or "*indenture*," &c.) because he says, &c. (here state the subject matter of defence, and then conclude as follows :) and this he the said *C D* is ready to verify ; wherefore he prays judgement if he ought to be charged with the said debt, by virtue of the said supposed writing obligatory, (or "*indenture*," &c.)

Escrow.

Delivery of
the bond as
an escrow.(t)
* 463

[1st Plea, *non est factum*, as ante, 460. 2d plea, by leave, &c. and *onerari non*, as in the last precedent.](t) Because he says, *that the said writing in the said declaration mentioned was made by him the said *C D*, on, &c. aforesaid, to secure the repayment of a certain sum of money then lent by the said *A B* to one *E F* and delivered by him the said *C D* to one *G H*, as an escrow, to be by him kept on this special condition, that is to say, that(u) if the said *E F* should within the space of — months then next following, secure the repayment of the said sum of money to the said *A B*, by a mortgage upon certain freehold premises of him the said *E F*, situate at, &c. that then and in that case the said writing obligatory should be immediately discharged, annulled and held for

(r) When the plea admits the validity of the deed, and that there was once cause of action, but avoids or discharges it by matter subsequent, the defendant should say, that "*plaintiff actionem non*," but where the validity of the deed is disputed, or where an heir pleads *rien per descent*, it is said that the defendant should say, "*onerari non debet*," 1 Saund. 290. n. 3. Com. Dig. Pleader, E. 27. Ld. Raym. 217. 2 Salk. 516.

(s) *Ante*, 460. n. (h).

(t) As to this plea in general, see Com. Dig. Pleader, 2 W. 18. and Fait. A. 3. 4 East, 94, 95. Delivery as an escrow may be given in evidence under the plea of *non est factum*, 4 Esp. Rep. 255. See the precedents in 7 Wentw. Index, 591, 595, 596, Rast.

Ent. 181. b. 182. a. Lil. Ent. 186. 2 Rich. C. P. 39. Sometimes they commence with the allegation, *actio non*, but as the validity of the deed is disputed, *onerari non* appears more correct. See the precedents, Rast. Ent. 181. b. 182. a. Co. Ent. 145. b. It is said that as this plea in effect denies the allegation that the defendant made his deed, the plea should conclude to the country, 1 Salk. 274. Ld. Raym. 1803. and so are many of the precedents, Rast. Ent. 181. b. 182. a. Co. Ent. 145. b. and see the precedent in Lil. Ent. 186. 2 Rich. C. P. 39.

(u) The following statement will necessarily be according to the facts of each particular case.

IN DEBT.

nothing, and returned and redelivered to the said *C D*, but *Escr*
that in default of the said *E F* so securing the repayment of
the said sum of money to the said *A B* by such mortgage as
aforesaid, within the aforesaid time, then the said writing obli-
gatory of the said *C D* should stand and be against him in full
force ; and the said *C D* further says, that within the space of
— months from the time of the making and delivering of
the said writing as an escrow to the said *G H* as aforesaid,
for the purpose aforesaid, to wit, on the — day of —, *A. D.*
—, at, &c. aforesaid, the said *E F* did secure the repay-
ment of the said sum of money to the said *A B*, by a mort-
gage upon the said freehold premises of him the said *E F*,
which said mortgage the said *A B* then and there accepted and
received as a security for the repayment of the said sum of
money so by him lent to the said *E F* as aforesaid ; whereby
the said writing of the said *C D* so delivered to the said *G H*,
became and was wholly discharged, annulled, and vacated ;
and so the said *C D* saith, that *the said writing is not his deed,
and of this he puts himself upon the country, &c.(*x*)

[1st, *Non est factum.* 2d, and for a further plea, *Uc. onerari* Deed
ed by
(y)
non, as ante, 462.] Because he says, that the said writing
in the said declaration mentioned, was obtained from the
said *C D* by the said *A B* (and others in collusion with
him) by fraud, covin and misrepresentation, that is to say,
by the said *A B* (and others in collusion with him) falsely and
fraudulently representing to the said *C D*, that, &c. (*here state*
the fraudulent misrepresentations, and that the deed was exe-
cuted in confidence of such representations, and conclude as fol-
lows :) to wit, at, &c. aforesaid, wherefore he the said *C D*
saith, that the said writing in the said declaration mentioned
was and is void in law, and this he the said *C D* is ready to
verify ; wherefore he prays judgment if he ought to be charged
with the said debt, by virtue of the said writing, &c. [*add a*

(*x*) As to this conclusion, see *ante*, (y) Fraud is a defence at law, 2
462. n. (s), and *Rast. Ent.* 181. b. *T. R.* 765. 3 *T. R.* 438.
182. a. *Co. Ent.* 145. b.

Fraud. *plea of fraud and covin generally, omitting the statement of the particular misrepresentations.]*

Dress. (z)

1st. Menace to
kill.

[1st, General issue, *non est factum*, as ante, 460. 2d and for a further plea, &c. *onerari non*, as ante, 462.] Because he says, that the said *A B*, just before the making of the said writing in the said declaration mentioned, to wit, on the said — day of —, *A. D.* —, aforesaid, at, &c. aforesaid, menaced and threatened the life of him the said *C D*, unless he the said *C D* would make and seal, and as his act and deed deliver the said writing in the said declaration mentioned; and the said *C D* did thereupon then and there, by reason and in consequence of such menaces and threats, and in fear and apprehension thereof, make and seal, and as his act and deed deliver the said writing. *And this, &c. [conclude with a verification, and *onerari non*, as ante, 462.]

* 465

2d. Battery,
and menace
of further bat-
tery, &c.

[And for a further plea, by leave, &c. *onerari non*, as ante, 462.] Because he says, that the said *A B*, just before the making of the said writing in the said declaration mentioned, to wit, on the said — day of —, *A. D.* —, aforesaid, at, &c. aforesaid, assaulted, beat, bruised and wounded the said *C D*, and then and there menaced and threatened further to beat, bruise and wound him the said *C D*, unless he the said *C D* would make and seal, and as his act and deed deliver the said writing in the said declaration mentioned; and the said *C D* did thereupon then and there, for and through fear and apprehension of losing his life, on that occasion make and seal, and as his act and deed deliver the same writing. And this, &c. [conclude as in the last plea.]

3d. Battery
and fear of
mayhem.

[Commencement as in the last plea.] Because he says, that the said *A B*, just before the making of the said writing in the said declaration mentioned, to wit, on the said — day of —, *A. D.* —, aforesaid, at, &c. aforesaid, assaulted, beat, bruised and wounded the said *C D*, and also then and there menaced and threatened further to beat, bruise and wound him

the said *C D* unless he the said *C D* would make and seal, *Duress.* and as his act and deed deliver the said writing in the said declaration mentioned. And the said *C D* did then and there, by reason and in consequence of the premises in this plea mentioned, and for fear of further wounding and of *mayhem*, and on no other account whatsoever, make and seal, and as his act and deed deliver the said writing. And this, &c. [*conclude as in the last precedent.*]

[*Commencement as in the last plea.*] Because he says, that he the said *C D*, at the time of making of the said writing, to wit, on the said — day of —, *A. D.* —, aforesaid, at, &c. was imprisoned by the said *A B* and *others in collusion with him, and then and there detained in prison, until by the force and *duress* of imprisonment of him the said *C D*, he made the said writing, and delivered the same to the said *A B* as his deed. And this, &c. [*conclude as in the last precedent. A plea that the deed was obtained by fraud and covin was added, as ante, 464.*]

4th. Duress of imprisonment.

* 466

C D }
ats. } [*Onerari non, as ante, 462.*] Because he says, that he the said *C D*, at the time of the making of the said writing, was an infant within the age of 21 years, to wit, of the age of — years, to wit, at, &c. aforesaid. And this, &c. [*conclude with a verification and onerari non, as ante, 462.*]

Infancy.

Infancy to debt on bond or deed. (z)

C D }
ats. } [*Actio non, as ante, 421.*] Because he says, that he the said *C D*, at the time of the making of the said supposed contracts in the said declaration mentioned, was an infant within

The like to debt on simple contract. (u)

(z) See the precedents, *Rast. Ent.* 163. a. *Bro. Red.* 176. If the defendant be still an infant, he must plead by guardian and not by attorney, *ante*, 410. n. (r). In an action upon a deed infancy must be pleaded specially, 3 *Burr.* 1805. *Com. Dig.* tit. *Pleader*, 2 *W.* 22. but in *assumpsit* it may be given in evidence under the general issue, *ante*, 424.

(a) See the note to the last precedent, and the precedents *Rast. Ent.* 163. a. *Co. Ent.* 125. b. *Bro. Red.* 200. 207. *Wentw. Index*, 577, 578. In debt on simple contract, it should seem that infancy might be given in evidence under the general issue, but it is most advisable to plead it, *ante*, 424.

Infancy. the age of 21 years, to wit, of the age of — years, to wit, at, &c. aforesaid, and this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

Coverture. *C D* } *ats.* [*Onerari non, as ante, 462.*] Because she saith, that
Coverture to *A B.* } at the time of the making of the said writing, she
debt on bond
or decl.(b)
 * 467 And this, &c. [*conclude with a verification, and onerari non, as ante, 462.*]

The like to *C D* } *ats.* [*Actio non, as ante, 461.*] Because she says, that she
debt on sim- *A B.* } the said *C D*, at the time of the making of the said
ple contract.
(c) supposed contracts, was and still is the wife of one *E F*, to wit,
 at, &c. aforesaid. And this, &c. [*conclude with a verification, as ante, 462. sixth precedent.*]

Usury. [*First plea, non est factum, after craving oyer of the bond and*
Usury to deb^t *condition, as ante, 460. 2d plea, by leave, &c. and onerari non,*
on bond.(d) *as ante, 462.*] Because he saith, that before the making the
 said writing in the said declaration mentioned, to wit, on the
 said — day of —, *A. D.* —, aforesaid, at, &c. aforesaid,
 it was corruptly, and against the form of the statute in that
 case made and provided, agreed by and between the said *A B*
 and the said *C D*, that the said *A B* should lend and advance
 unto the said *C D* the sum of 46*l.* of lawful money of *Great*
Britain, and that the said *A B* should forbear and give day of
 payment thereof to the said *C D* until and upon the —
 day of —, *A. D.* —, then next ensuing, and that the said
C D, for the loan of the said sum of 46*l.* and for giving day of

(b) See the notes to the precedent, *ante*, 425. Com. Dig. Pleader, 2 W. 21. If the defendant be still a *feme covert*, she must plead in person, and not by attorney, *ante*, 409. n. (p). Coverture may be either pleaded specially, or may be given in evidence under the general issue, *non est factum*, 3 Burr. 1805. 12 Mod. 101. 2 Stra. 1104. Com. Dig. Pleader, 2 W. 13.

(c) See the notes to the last precedent.

(d) As to this plea in general, see Com. Dig. Pleader, 2 W. 23. 1 Saund. 295. a. b. and the precedents indexed in 7 Wentw. 628 to 631. The usurious agreement must be stated precisely according to the facts, 3 T. R. 538.

IN DEBT.

payment thereof as aforesaid, for the time aforesaid, should *Usur*
 give and pay to the said *A B* on the said — day of —
A. D. —, aforesaid; then next ensuing, the sum of 4*l.* of like
 lawful money, making together, with the said sum of 46*l.* so
 to be lent and advanced by the said *A B* to the said *C D* as
 aforesaid, the said sum of 50*l.* in the said condition mentioned,
 and also that the said *C D* should pay to the said *A B* interest
 on the said sum of 50*l.* from the — day of —, *A. D.* —,
 aforesaid, until the time of the payment of the said sum of
 50*l.* in the said condition mentioned, and that for securing the
 payment of the *said sum of 50*l.* with interest for the same as
 aforesaid, to the said *A B*, he the said *C D* should make and
 seal, and as his act and deed deliver to the said *A B* a certain
 writing obligatory, and should thereby bind himself in the penal
 sum of 100*l.* conditioned for the payment of the said sum of 50*l.*
 by him the said *C D* unto the said *A B* on the said — day
 of —, *A. D.* —, aforesaid, then next ensuing, with interest
 for the said sum of 50*l.* in the mean time, as aforesaid, to be
 paid quarterly, to wit, at, &c. aforesaid. And the said *C D* in
 fact further saith, that in pursuance of the said corrupt and un-
 lawful agreement so made as aforesaid, the said *A B* after-
 wards, to wit, on the said — day of —, *A. D.* —, afore-
 said, to wit, at, &c. aforesaid, lent and advanced to the said *C D*
 the said sum of 46*l.* and that for the securing the repayment
 thereof, together with the said sum of 4*l.* so to be paid and
 given to the said *A B* as aforesaid, for the purpose aforesaid,
 on the said — day of —, *A. D.* —, aforesaid, then next
 ensuing, with interest in the mean time as aforesaid, to be paid
 quarterly, as well for the said sum of 46*l.* so lent and advanced
 as aforesaid, as for the said sum of 4*l.* so to be given and paid
 to the said *A B* as aforesaid, for the purpose aforesaid, making
 together the sum of 50*l.* as aforesaid, he the said *C D* in
 further pursuance of the said corrupt and unlawful agreement,
 then and there, to wit, on the said — day of —, *A. D.* —,
 aforesaid, at, &c. aforesaid, made and sealed, and as his act
 and deed delivered to the said *A B* the said writing in the said
 declaration mentioned, and the said *A B* then and there accept-
 ed and received the said writing with the said condition there-
 under written, of and from him the said *C D*, in pursuance of
 the said corrupt and unlawful agreement, and for the purpose

Unry.

aforesaid. And the said *C D* avers, that the said sum of 4*l.* so as aforesaid agreed to be given and paid to the said *A B* for the purpose aforesaid, and the interest of the said sum of 50*l.* so reversed and made payable to the said *A B* by the said condition of the said writing as aforesaid, exceeds the rate of 5*l.*

* 469

*for the forbearing and giving day of payment of 100*l.* for one year, contrary to the form of the statute in such case made and provided, by means whereof, and by force of the said statute, the said writing was and is wholly void in law. And this, &c. [*conclude with a verification, and onerari non, as ante, 462.*]

Tender to
debt on sim-
ple contract.
(e)

C D } And the said *C D*, by *E F* his attorney, comes and
ats } defends the wrong and injury, when, &c. and as to the
A B. } said several sums of money in the said declaration mentioned
and thereby demanded, except as to the sum of —*l.* (*the sum
tendered,*) parcel thereof, says that he does not owe the same
or any part thereof to the said *A B* in manner and form as the
said *A B* hath above thereof complained against him, and
of this he puts himself upon the country, &c. And as to the
said sum of —*l.* parcel of the said several sums of money in
the said declaration mentioned, the said *C D* says that the said
A B ought not to have or maintain his aforesaid action thereof
against him, to recover any damages by reason of the non-pay-
ment of the said sum of —*l.* parcel, &c. because he says, that he
the said *C D* at the time when the said sum of —*l.* parcel, &c.
became due and payable from him the said *C D* to the said
A B, was and from thence hitherto hath been, and still is,
ready to pay to the said *A B* the sum of —*l.* parcel, &c. to
wit, at, &c. aforesaid, and that after the time when the said
sum of —*l.* parcel, &c. became due and payable, and before
the exhibiting of the bill of the said *A B* in this behalf, (*or if
in C. P. or by original, "before the commencement of this suit,"*)
to wit, on, &c. (*state the tender and proffer in curiam, as in as-
sumpsit, ante, 432.*) And this he is ready to verify; wherefore
he prays judgment if the said *A B* ought to recover any da-

(e) As to the form of this plea in debt, see 1 Saund. 33. n. 2. Com. 577, 578.
Dig. Pleader, 2 W. 28. and the pre-

mages by reason of, the non-payment of the said sum of —l. Set-off.
parcel, &c.

* *C D* } *ats.* [*Actio non, after craving oyer, as ante, 460, 461.*] Because * 470
Set-off to debt
on bond. (f)
A B. } he says, that at the time of the exhibiting of the bill of
 the said *A B* against him the said *C D*, in this behalf, (or if in
C. P. or by original, “at the time of the commencement of this
 suit,”) there was due and owing from the said *C D* to the said
A B upon the said writing obligatory, by the said condition
 thereof, for the principal and interest in the said condition
 mentioned, a certain sum of money, to wit, the sum of —l. to
 wit, at, &c. aforesaid; and the said *C D* further says, that the
 said *A B*, before and at the time of the exhibiting of the said
 bill, (or if in *C. P.* or by original, “before and at the time of
 the commencement of this suit,”) was and still is indebted to him
 the said *C D* in a much larger sum of money than the money so
 due and owing from the said *C D* to the said *A B*, upon the said
 writing obligatory, that is to say, in the sum of —l. for, &c.
 (here state the subject matter of set-off, as in *assumpsit*, ante,
 442 to 448.) which said sum of money so due and owing from
 the said *A B* to the said *C D* is wholly unpaid, and exceeds
 the money so due and owing from the said *C D* to the said
A B by virtue of the said condition of the said writing obliga-
 tory, and which said sum of money so due and owing from the
 said *A B* to the said *C D* as aforesaid, or so much thereof as
 shall be necessary in this behalf, he the said *C D* is ready and
 willing, and offers to set off and allow against the said sum of
 money so remaining *due and payable by the condition of the
 said writing obligatory, according to the form of the statute in
 such case made and provided. And this, &c. [conclude with a
 verification, as ante, 432. sixth precedent.]

* 471

(f) See the precedents, 7 Wentw. 589, 590, 591. &c. When either of the debts accrued by reason of a penalty, the debt intended to be set off must be pleaded, and the defendant cannot give notice of set-off, 8 Geo. II. c. 4. s. 5. and by the same statute in a plea of set-off to an action on a bond, the defendant must set forth the sum really due on the bond before he is

entitled to set off any cross demand, 6 T. R. 460. and the sum is traversable, though laid under a *scilicet*, *id.* *ibid.* 3 T. R. 65. Ante, vol. 1. Index, tit. Set-Off, see the precedents indexed 7 Wentw. 589, 590, 591. &c. The plea of set-off to debt on simple contract, resembles those in *assumpsit*, ante, 440 to 448.

Bankruptcy
of plaintiff.

See *ante*, 426. n. (u). To debt on bond or other specialty brought in the name of a bankrupt, it is necessary to plead his bankruptcy specially, and the defendant cannot give it in evidence under the general issue, *non est factum*, as in *assumpsit*, see *ante*, 426. n. (u). The form of the plea is in 7 *Wentw.* 414. As to this plea, see 1 *T. R.* 619. 3 *B. & P.* 40. and *ante*, 426.

Statute of li-
mitations.

The plea of the statute of limitations to debt on simple contract, is similar to the plea of *actio non accrevit* in *assumpsit*, as *ante*, 450. As to pleading the statute in debt, see *ante*, vol. 1. Index, tit. Limitation, and 1 *Saund.* 283. note 2. 35. 280. To debt on specialty, there is no plea of the statute of limitations, though after the lapse of twenty years, or even less, payment will in general be presumed of a money bond, provided the defendant plead, *solvit ad*, or *post diem*, as *post*, 473, 474. See *Tidd's Prac.* 3d edit. 19 to 22.

Pleas by ex-
ecutors in ge-
neral.

The pleas by executors in debt, so much resemble those in *assumpsit*, that it may be sufficient to refer to the precedents, *ante*, 450 to 458. The following precedent will shew that the principal difference between the pleadings in *assumpsit* and debt, is that in the latter the word "*debt*" is adopted instead of "*damages*," and see the numerous precedents, indexed in 7 *Wentw.* 596 to 603. *Com. Dig. Pleader*, 2 D. 9.

Plene admi-
nistravit.

[Same as the precedent in *assumpsit*, *ante*, 451. to the obelisk, and then as follows:] Whereby he could or might pay or satisfy the debt aforesaid, or any part thereof. And this, &c. [Conclude with a verification, as *ante*, 422. sixth precedent.] The notes to the precedent, *ante*, 451. are here also applicable and see also *Com. Dig. Pleader*, *2 D. 9. To debt on simple contract, or on bond or other specialty, this general plea is sufficient, but it has been decided, that to debt upon a record, it must be shewn in the plea how the defendant administered, see 1 *Ld. Raym.* 3. *Aleyn*, 48. *sed quære*.

* 472

[*Actio non, as ante, 421. first precedent to the obelisk.*] Because he saith, that after the death of the said *E F*, and before the said *C D* had any notice of the said writing obligatory in the said declaration mentioned, to wit, on, &c. at, &c. aforesaid, he the said *C D* had fully administered all and singular the goods and chattels, which were of the said *E F*, deceased, at the time of his death, and which have ever come to his hands to be administered; and that he hath not, nor had he at the time when he first had notice of the said writing obligatory, or at any time afterwards, any goods or chattels, which were of the said *E F* deceased, at the time of his death, in his hands to be administered. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

Pleas by ex-
ecutors in ge-
neral.

Plene admin-
istravit be-
fore notice of
the bond.(g)

C D } And the said *C D* by *E F*, who is admitted by the
ats. } court of our said lord the king here, as guardian(i)
A B. } of the said *C D*, to defend for the said *C D*, who is an infant
under the age of 21 years, comes and defends the wrong and
injury, when, &c. and says that he the said *C D* is within the
age of 21 years, to wit, of the age of — years, to wit, at, &c.
aforesaid, and this he is ready to verify; wherefore he does not
suppose that during his minority he ought to answer the said
A B in his said plea, and he prays that the said parol may de-
mur, until the full age of him the said *C D*, &c.

To bonds.
Parol demur-
rer by an in-
fant heir.(h)

[**Onerari non, as ante, 462.*] Because he saith, that he the said *C D* hath not, nor at the time of the exhibiting the bill of the said *A B* in this behalf, (*or if in C. P. or by original, "at the time of the commencement of this suit,"*) nor at any time before or since, had any lands, tenements or hereditaments by descent from his said father, (*or brother, &c. according to the fact,*)

* 473
Rien per de-
scent by heir.
(k)

(g) This plea is sometimes adopted, but the general plea of *plene administravit*, putting in issue the due administration of the assets will in general suffice.

(h) See the precedents, 4 East, 485. 1 Wentw. 43. As to the law, Bao. Abr. tit. Infancy, L. Com. Dig.

tit. Infant, D. and tit. Pleader, 2 E. 3. An infant *devisee* cannot pray the parol to demur, 4 East, 485.

(i) This is necessary, *ante*, 410. n. (r).

(k) See the precedents indexed in 7 Wentw. 603, 604. Rast. Ent. 172. and as to the pleas in general by an

To bond.

In fee-simple, and this he is ready to verify; wherefore he prays judgment, if he as son, (or brother, &c.) and heir of the said *G H* deceased, ought to be charged with the said debt, by virtue of the said writing obligatory.

Plea by a devisee rien per devise. (1)

[*Onerari non, as ante, 462.*] Because he says that he the said *C D* hath not, nor at the time of the exhibiting of the bill of the said *A B* in this behalf, (or if in *C. P.* or by original, "at the time of the commencement of this suit,") nor at any time before or since, had any lands, tenements or hereditaments, by devise from the said *E F* deceased. And this, &c. [*conclude with a verification, and onerari non, as ante, 462.*]

Solvit ad diem. (m)

C D } ats. [*Actio non, after craving oyer, as ante, 460, 461.*] Because *A B*. } he says that he the said *C D*, on the said — day of —, *A. D.* — aforesaid, (the day of payment mentioned in the condition,) in the said condition of the said writing obligatory mentioned, paid to the said *A B* the said sum *of —. in the said condition mentioned, together with all interest then due thereon, according to the form and effect of the said condition, to wit, at, &c. aforesaid. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*].

* 474

Solvit post diem. (n)

C D } ats. [*First plea, solvit ad diem, as in the last precedent, 2d, A B.*] } actio non, as ante, 421. third precedent.] Because he says, that he the said *C D*, after the said — day of —, *A. D.* —, in the said condition mentioned, and before the

heir, 2 Saund. 7. n. 4. Com. Dig. Pleader, 2 E. 3. Bao. Abr. tit. Heir, F. The heir must plead *rien per descent* where he has no assets, or he will be liable personally to the amount of the debt, 3 T. R. 685. See a plea of retainer by an heir, 1 T. R. 454. As to what are assets by descent, see ante, 159. n. (w), and Selwyn's N. P. 523. n. 65. 2 Saund. 7. As to the plea of *rien per descent prater a term* for life or years, 2 Saund. 7. n. 4. 1 Salk. 354. 2 Wils. 49. See a precedent, of *rien per descent prater a rectory*, &c. 1 Rast. Ent. 172. h. Lil. Ent. 180.

(1) See the precedents, 7 Wentw. 603 to 605. The devisee must be sued jointly with the heir, ante, 161. n. (b), but he should plead separately.

(m) See Com. Dig. Pleader, 2 W. 29.

(n) This plea is given by the stat. 4 Ann. c. 16. s. 12. When executors plead *solvit post diem*, and rely

exhibiting of the bill of the said *A B* in this behalf, (or if in *To bonds. C. P. or by original, "before the commencement of this suit,"*) to wit, on, &c. at. &c. aforesaid, paid to the said *A B* the said sum of —*l.* in the said condition mentioned, together with all interest then due thereon, according to the form and effect of the said condition of the said writing obligatory. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

[*First, non est factum, after craving oyer of the bond and condition, as ante, 460, 461. And for a further plea, Sc. onerari non, as ante, 462.*] Because he says, that no memorial of the said writing, in the said declaration mentioned, was enrolled in the high court of chancery, within twenty days of the execution thereof, according to the directions of a certain act of parliament made and passed in the 17th year of the reign of his present majesty; whereby the said writing in the said declaration mentioned is null and void. And this, &c. [*conclude with a verification, and onerari non, as ante, 462.*]

To annuity deeds.

To debt on annuity bond no memorial enrolled within twenty days, according to 17 Geo. III. c. 26.

[*General issue, and second plea as last precedent. And for a further plea in this behalf, onerari non, as ante, 462.*] Because he says, that no memorial of the said writing, *containing the names of all the witnesses to the execution thereof, was enrolled in the high court of chancery, according to the directions of the said act of parliament, made and passed in the 17th year of his present majesty's reign, whereby the said writing in the said declaration mentioned, is null and void. And this, &c. [*conclude with a verification, and onerari non, as ante, 462.*]

No memorial containing the names of the witnesses enrolled.

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[*General issue, non est factum, after craving oyer of the bond and condition, as ante, 460, 461. And for a further plea, Sc. actio non, as ante, 421.*] Because he says, that he the said *C D* did well and truly pay to the said *A B* yearly and every year, the said annuity or sum of —*l.* in the said condition mentioned, by four equal quarterly payments in each year, on the several

Payment of the annuity on the days mentioned in the bond.

upon the presumption of payment *post diem*, as well by the testator as arising from the lapse of time, it is by the executor in separate pleas, advisable in general to plead *solvit*

To arbitration bonds. him the said *A B*. And this, &c. [*conclude with a verification as ante, 422. sixth precedent.*]

Other pleas to debt on arbitration bonds, &c.

See the precedents indexed, 7 *Wentw.* 611, 612. Care must be taken to state with precision the ground of defence in the plea. If there were an award in *fact*, and the defendant rely upon some defect therein, he should not merely plead that no award was made, because he cannot under that plea go into objections to the award in point of *law*, 4 *T. R.* 588. So if the defendant rely upon the non-performance by the plaintiff of a condition precedent, or that the bond was not ready to be delivered, he should *plead those facts specially, 2 *Saund.* 183 to 188. 1 *Saund.* 327. b. As to a plea of performance generally, see the precedent and notes in 1 *Saund.* 324. Partiality and improper conduct in an arbitrator in making his award without hearing the defendant and his witnesses, cannot be pleaded in bar to an action on the bond conditioned for the performance of the award, but is only matter for application to the equitable jurisdiction of the court to set aside the award; neither can a parol agreement between the parties to waive and abandon the award be pleaded to such action, 8 *East*, 344. 1 *Saund.* 372. a. n. 3. 30, 31.

* 478

To bail bonds. No process in the original action. (q)

[*Onerari non*, as *ante*, 462.] Because he says, that no writ or process whatsoever, returnable in the court of our said lord the king, before the king himself, (or in *C. P.* "in the said court of our said lord the king of the bench at Westminster,") was sued and prosecuted by and at the suit of the said *A B* in the said suit in the said condition mentioned. And this, &c. [*conclude with a verification, and onerari non*, as *ante*, 462.]

Plea by one of the bail that the bond was taken for ease and favour after return of writ, contrary to the stat. 23 Hen. VI. c. 9. (r)

[*Onerari non*, as *ante*, 462.] Because he says, that after the making of a certain act of parliament, made and passed in

(q) See the precedents, *Morg.* Prec. 513, 514. 7 *Wentw.* 613.

(r) See precedents of pleas of ease and favour, *Brownl. Red.* 222. 7 *Wentw.* 613, 614. 1 *Saund.* 15. 157. 2 *Saund.* 76. and as to this plea in general, see *Com. Dig.* Pleader, 2 W. 25. 1 *Saund.* 163. n. 2. 2 *Saund.* 60. in notes. It has been usual in pre-

cedents of this plea, to set forth a great part of the statute, see *Lil. Ent.* 126. *Morg. Prac.* 507. and other precedents, 7 *Wentw.* 613. but this is unnecessary, the statute being a public act, 2 *T. R.* 575. and if it be misrecited the mistake will be fatal, *Doug.* 94. 97. 6 *T. R.* 776. 5 *Wentw.* 480. n. a.

the twenty-third year of the reign of our lord *Henry VI.* formerly king of *England*, to wit, on the — day of —, *A. D.* —, to wit, at, &c. aforesaid, the said *E F* in the said declaration of the said *A B* named, was arrested at the suit of the said *A B*, under colour of the said writ, in the said declaration mentioned *by the said *G H*, who then and there was sheriff of the said county of —, and the said *E F* was kept and detained by the said sheriff, in the custody of him the said sheriff, under colour of the said writ, and under the said arrest, for want of his finding bail for his appearance before his said majesty, from the said — day of —, *A. D.* —, aforesaid, and until after the said — day of —, *A. D.* —, mentioned in the said writ, and until he the said *C D*, as bail or surety for the said *E F*, afterwards and after the return of the said writ, to wit, on the — day of —, *A. D.* —, aforesaid, at, &c. aforesaid, by the said writing in the said declaration mentioned, bearing date the — day of —, *A. D.* — aforesaid, but in fact sealed by the said *C D*, and by him delivered as his act and deed, on the said — day of —, *A. D.* — aforesaid, and not before the return of the said writ, became bound to the said then sheriff, in the said sum of —*l.* under the condition above mentioned, for ease and favour to be shewn by the said sheriff to the said *E F*, from his said imprisonment, and from his deliverance therefrom to be had and obtained; which said writing the said then sheriff then and there took of the said *C D* by colour of his said office as sheriff of the county of —, contrary to the statute aforesaid, and so the said *C D* saith, that the said writing so brought here into court, is void in law by force of the said statute. And this, &c. [*conclude with a verification, and onerari non, as ante, 462.*]

* 479

[*Actio non, as ante, 421. first precedent.*] Because he says, *Compernit ad diem.* (*) that the said *E F* did appear before our lord the king at *Westminster*, on —, in the said condition of the said writing obli-

(*) See the precedents, 5 Wentw. 470. 478. Lil. Ent. 114. Brownl. Red. 203.
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To bail-bonds. gatory mentioned, according to the form and effect of the said condition; as by the record of the said appearance remaining in the said court of our said lord the king before the king himself, at *Westminster* aforesaid, more fully appears. And this, &c. [*conclude with a verification by the record, as ante, 422. seventh precedent.*]

* 480

Other pleas. See the different precedents indexed in 7 *Wentw.* 613, 614. and as to the law, 2 *Com. Dig. Pleader*, 2 W. 25. 2 *Saund.* 59, 60. in notes. The defendant may plead that the sheriff did not assign the bond according to the form of the statute, &c. 2 *Saund.* 61. b. What he cannot plead, see 7 *East*, 148.

To replevin bonds.

See the precedents of pleas in actions on replevin bonds, 7 *Wentw.* 621. *Willes*, 5, 6. As these pleas do not very frequently occur in practice, it is sufficient to refer to the above precedents.

To bastardy bonds.

Non damnificatus (t)

[*First general plea, non est factum, after craving oyer of bond and condition, as ante, 460, 461. 2d plea, action non, as ante, 421. third precedent.*] Because he says, that the said churchwardens and overseers of the poor of the parish of — aforesaid, at the time of making the said writing obligatory, and named in the said condition thereof, and their successors for the time being, and the inhabitants and parishioners of the parish of —, at the time of making the said writing obligatory, and mentioned in the said condition, and their successors for the time being, have not, nor have, nor hath any or either of them at any time since the

(t) See the declaration on a bastardy-bond setting out the condition, *ante*, 154. and the precedents of pleas, 2 *Saund.* 81. 7 *Wentw.* 615, 616. If the condition of the bond be merely to indemnify the churchwardens, &c. this plea is sufficient, but if, as is frequent, the condition be for the payment of a specific sum per week for the maintenance of the child, performance must be pleaded

specially, see 1 B. & P. 638. 640. n. a. b. 1 *Saund.* 116. n. 1. Care also must be taken to plead specially in excuse of performance, for if the defendant plead *non-damnificatus*, he cannot afterwards rejoin, that the plaintiff would not suffer him to support the child, or that the plaintiff was damaged of his own wrong, as such rejoinder would be a departure, *ante*, 476. 2 *Saund.* 83.

making *of the said writing obligatory, hitherto been in any manner whatsoever damnified, for, or by reason, or by means, or on account of any matter, cause, or thing, in the said condition of the said writing obligatory mentioned. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

On indemnity bonds.

[*Actio non, after craving oyer of the bond and condition, as ante, 460.*] Because he says, that the said *AB* hath not at any time since the making of the said writing obligatory and condition thereof, hitherto been in any wise damnified, by reason or means of any matter, cause, or thing in the said condition of the said writing obligatory mentioned. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

Non damnificatus.(u)

[*Actio non, after craving oyer(y) of the bond and condition, and setting out the latter, as ante, 460.*] Because he saith, that he the said *CD* did,(z) from time to time, *and at all times after the making of the said writing obligatory, and the said condition thereof, well and truly observe, perform, fulfil, and keep all and singular the articles, clauses, payments,

On bonds for performance of covenants. First performance generally of bond conditioned for performance of acts therein mentioned.(x)

* 482

(u) See the notes to the last precedent, and the precedents, 7 Wentw. 616 to 621. 1 Saund. 115. When the condition of the bond is merely to indemnify, this plea is sufficient, but when the condition stipulates to perform any particular act, performance must be specially pleaded, 1 Saund. 116. n. 1. as in the following precedents, 1 B. & P. 638. 640.

(x) Where all the covenants, &c. in the bond are in the affirmative, and not in the negative, nor in the disjunctive, nor alternative, performance may be pleaded generally in the words of the condition, and the plaintiff must in his replication shew a breach, 2 Saund. 410. n. 3. 4 East, 340. Com. Dig. Pleader, E. 26. 1 Saund. 116. n. 1. *Ante*, vol. 1. Index, tit. Performance. See the precedents

of performance generally, 7 Wentw. Index, 537. but if there be any thing specific or particular in the thing to be performed, though consisting of a number of acts, performance of each must be particularly stated, 1 Saund. 116, 117. n. 1. 4 East, 344. *Ante*, vol. 1. Index, tit. Performance.

(y) A defendant cannot plead performance of the condition, without praying *oyer* and setting out the condition *in hæc verba*, 2 Saund. 409. n. 2.

(z) In pleading performance generally, the allegations in the plea are usually in the words of the condition, unless the thing to be performed be specific, in which case the time and mode of performance should be specially stated, *supra*, n. (x).

On bonds for performance of covenants.

conditions, and agreements in the said condition of the said writing obligatory specified, comprised, and mentioned, in all things therein contained on his part and behalf to be observed, performed, fulfilled and kept, according to the tenor and effect, true intent and meaning of the said condition of the said writing obligatory. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

The like to a bond conditioned for the performance as well of negative as of disjunctive and affirmative covenants.

Observances of the negative covenants.

Performance of the alternative or disjunctive covenant.

Performance of the affirmative covenant.

[*See the notes to the last precedent, and the precedents in 3 Wils. 383. Comh. 575, 576. 2 Saund. 409.*] The plea may be in the following form: (*Actio non, after craving oyer of the bond and condition, containing stipulations not to perform some acts and to perform others, as also stipulations in the disjunctive or alternative, and in the affirmative, and setting out the condition, as ante, 460.*) Because he saith, that he the said C D did not, &c. (*alleging that defendant did not do any of the acts he stipulated not to perform, and which may be in the words of the condition, see the precedent, 2 Saund. 409. and then proceed to state the defendant's performance of the alternative covenant, according to the fact, which may be as follows:*) And the said C D in fact saith, that he the said C D, after the making of the said writing obligatory, to wit, on the — day of — A. D. —, at, &c. aforesaid, did, &c. (*here state the performance by the defendant of the alternative covenant, i. e. that he did one or other of the acts which he had the option to perform, and then state generally the defendant's performance of the affirmative covenants as follows:*) And the said C D further saith, that he the said C D did, from time to time, and at all times, after the making of the said writing obligatory, well and truly observe, perform, fulfil, and keep all and singular other the articles, clauses, payments, conditions and agreements, in the said condition of the said writing obligatory specified, comprised or mentioned in all things *therein contained on his part and behalf, to be observed, performed, fulfilled and kept, according to the tenor and effect, true intent and meaning of the said condition of the said writing obligatory. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

[*Actio non*, as ante, 460. after craving oyer of the bond and condition, and setting out the latter, which was for the performance of covenants in an indenture.] Because he says that the said indenture, (or "articles of agreement," &c. according to the fact,) in the said condition of the said writing obligatory mentioned, was and is a certain indenture, (or "articles of agreement," &c.) made heretofore, to wit, on the — day of —, A. D. —, to wit, at, &c. aforesaid, between the said A B of the one part, and the said C D of the other part, and which said indenture, sealed with the seals of the said A B and C D, respectively, and bearing date the same day and year aforesaid, is now in the custody, possession, or power of the said A B, and therefore he the said C D cannot produce the same here in court, and which said indenture is as follows : (here copy the indenture verbatim, to the end of the words "in witness," &c.) as by the said indenture, reference being thereunto had, will fully appear ; and the said C D further saith, that he the said C D hath always, since the making of the said writing obligatory, hitherto well and truly observed, performed, fulfilled and kept, all and singular the covenants, articles, clauses, provisoes, *conditions and agreements in the said indenture comprised and mentioned, which on the part and behalf of him the said C D and his assigns, were or ought to be observed, performed, fulfilled or kept, according to the true intent and meaning of the said indenture. And this, &c. [conclude with a verification, as ante, 422. sixth precedent.]

On bonds for performance of covenants.

Performance generally to debt on bond conditioned for performance of covenants in an indenture. (a)

* 484

[*Actio non*, after craving oyer of the bond and condition, and setting out the latter, as ante, 460.] Because he says, that

The like is a more concise form. (b)

(a) See the precedents, 1 Saund. 52 to 58. 3 Wils. 381 to 385. and 7 Westw. 537. and the notes to the preceding precedents. The whole of the indenture referred to in the condition, ought in strictness to be set forth as in the precedent, 1 Saund. 52 to 55. see 4 East, 344 n. 4. and 345, 346. 1 Saund. 316, 317. n. 2. 9. n. 1. 2 Saund. 409 n. 2. and the defendant cannot crave oyer of such in-

denture, though it be in the hands of the plaintiff, though the court will compel the plaintiff to give a copy of the indenture to the defendant, where he has not one part in his possession, 1 Saund. 8, 9.

(b) As to this form of pleading, see 4 East, 345. Ante, 483. n. (a), and 1 Saund. 317. n. 2. and vol. 1. Index, tit. Performance. It is questionable whether this form will suffice, it has

On bonds for performance of covenants.

there was not, nor is there any negative or disjunctive covenant or agreement contained or specified in the said indenture, in the said condition of the said writing obligatory mentioned, on the part and behalf of the said *C D* to be omitted, done, observed, performed, fulfilled or kept, and that he the said *C D* hath well and truly performed, fulfilled and kept, the said last-mentioned indenture, and all things therein contained, on his part and behalf to be observed, performed, fulfilled and kept, according to the true intent and meaning thereof. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

Performance specially.

See the precedents, 1 Saund. 145, 146. 3 Wils. 383. and 5 Wentw. 537, 538. The form of this plea is precisely similar to the four preceding precedents, except in the mode of stating the performance, which must necessarily be according to the fact of each particular case, and may be in substance, as in the precedents above referred to.

Excuse of performance.

* 485

[*After craving oyer of the bond and condition, and setting out the latter, and pleading actio non, as ante, 460.*] and if the bond be conditioned for the performance by the defendant of covenants in an indenture, &c. stating such indenture, pleas of this nature, state the matter of excuse for the defendant's non-performance, and conclude with a verification. *see the precedent, 1 Saund. 100.* of a plea to debt on bond, conditioned to account for monies, &c. that no money, &c. came to the defendant's hand, and *see 3 East, 485.* where the death of one of several obligees was pleaded to debt on a bond to account for monies received by the defendant for the deceased and the other obligees; the following plea of non-performance by the plaintiff of a condition precedent, may serve as a general precedent, as to the mode of arranging the different allegations.

frequently been adopted in practice where the indenture referred to in the condition, is very long. If there be a negative or disjunctive covenant, the plea may state, that the indenture contained the same, and aver that

there were no other such covenants, and shew performance thereof, and conclude as above, stating the general performance of the affirmative covenants.

[*Actio non, after craving oyer of the bond and condition, and setting out the latter, as ante, 460. or if the bond be conditioned for the performance of covenants in an indenture, and the plaintiff have neglected to perform a condition precedent therein, then set forth the indenture, and the reference thereto as in the precedent, ante, 483. and then state the plaintiff's non-performance as follows:*] And the said *C D* as to the said covenant in the said indenture contained, that he the said *C D* would, during the continuance of the said demise, repair, and keep in repair, the said demised premises with the appurtenances, being allowed timber in the rough, sufficient and proper for such repair, from time to time to be provided and set out by the said *A B*, his heirs and assigns, (*this is to be according to the words of the particular covenant qualified by the condition precedent,*) the said *C D* saith, that at the time of the making of the said demise, the said premises were ruinous, prostrate, and in great decay, for want of needful and necessary reparation and amendment thereof, and that after the making of the said indenture, to wit, on the — day of —, *A. D.* —, at, &c. aforesaid, there was need and occasion for a large quantity, to wit, — loads of timber in the rough, to repair the said demised premises with the appurtenances; and the said *C D* then and there requested the said *A B* to allow to him the said *C D* timber in the rough, sufficient and proper for the repair of the said demised premises with the appurtenances, and to provide and set out the same accordingly, yet the said *A B* did not, nor would, when he was so requested as aforesaid, or at any time before or since, allow to him the said *C D*, timber in the rough, sufficient or proper for the repair of the said demised premises with the appurtenances, or provide or set out the same, but then and there wholly neglected and refused, and hath thence hitherto wholly neglected and refused so to do, to wit, at, &c. aforesaid. And the said *C D* further saith, that he the said *C D* hath always, since the making of the said writing obligatory, well and truly observed, performed, fulfilled, and kept all and singular other the covenants, articles, clauses, provisoes, payments, conditions and agreements, in the said indenture comprised and mentioned, which on the part and behalf of him the said *C D*, and his assigns, were or ought to be observed, performed, fulfilled or kept, according to the true

On bonds for performance of covenants.

Non-performance by plaintiff of a condition precedent.

On leases and demises. intent and meaning of the said indenture. And this, &c. [conclude with a verification, as ante, 422. sixth precedent.]

No rent in arrear. (c) [*Actio non, as ante, 421. first precedent.*] Because he says, that no part of the said rent in the said declaration mentioned, is in arrear or unpaid in manner and form as the said *A B* hath above in his declaration in that behalf alleged, and of this he the said *C D* puts himself upon the country, &c.

Eviction. (d) * 487 [*First plea, nil debet, (e) as ante, 459. 2d plea, actio non, as ante, 421. third precedent.*] Because he says that the said *A B* after the making of the said indenture, and before any part of the said rent in the said declaration mentioned, became due and payable to the said *A B*, to wit, on, &c. with force and arms, &c. entered into and upon the said demised premises, and then and there ejected, expelled, put out, and amoved the said *C D* from the possession thereof, and kept and continued him the said *C D* so ejected, expelled, put out, and amoved from thence hitherto, to wit, at, &c. aforesaid. And this, &c. [conclude with a verification, as ante, 422. sixth precedent.]

Plea by lessee that he assigned the term to a third person whom the plaintiff accepted as tenant. (f) [*Actio non, as in 1st or 3d precedent, ante, 421.*] Because he says, that after the making of the said demise in the said declaration mentioned, and before any part of the said rent in the said declaration mentioned became due and payable, to wit, on, &c. at, &c. he the said *C D* by a cer-

(c) This plea is sufficient in debt for rent, though not so in covenant, Cowp. 588. The above precedent is the form of the plea adopted in that case.

(d) See the precedent and note, 1 Saund. 204. n. 2.

(e) This plea is sufficient, though the demise were by deed, 2 Saund. 297. n. 1. 2 Ld. Raym. 1503. As to this plea in general, see 1 Saund. 204. n. 2. In debt for rent, an eviction may be given an evidence under the general issue, but in covenant it

must be pleaded, 1 Saund. 204. n. 2.

(f) See the precedents, 2 Saund. 297, 298. 7 Wentw. 625. Where rent has been accepted of an assignee, the lessee cannot be sued in debt, but only in covenant, if the demise were by deed; or in assumpsit, if the demise were by parol, ante, vol. 1. page 106. 1 Saund. 241. 2 n. 5. It should be shewn in a plea that the assignment was signed according to the statute of frauds, 1 Saund. 276. n. 2. 2 Saund. 297. n. 1, 2. Sir T. Raym. 451.

tain indenture of assignment by him then and there made, and duly signed by him the said *C D*, and sealed with his seal, for the considerations therein mentioned, did bargain, sell, assign, transfer, and set over all the right, title, interest, term of years then to come, and unexpired property, claim and demand whatsoever, of him the said *C D*, of, in, and to the said several demised premises with the appurtenances; by virtue of which said indenture of assignment, the said *G H*, afterwards, to wit, on, &c. last aforesaid, entered into the said demised premises, with the appurtenances, and became and was thereof possessed for the residue of the said term then to come therein and unexpired, whereof the said *A B*, on, &c. last aforesaid, had notice; and the said **C D* further saith, that the said *A B*, after the entry of the said *G H* into the said demised premises, with the appurtenances under and by virtue of the said assignment, to wit, on, &c. at, &c. aforesaid, did accept and receive of and from the said *G H* a large sum of money, to wit, the sum of —*l.* for the rent aforesaid, in form aforesaid reserved and then made payable, and then and there accepted the said *G H* as his tenant of the said demised premises, with the appurtenances. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

On leases and demises.

* 488

[*First plea, nil debet, as ante, 459. 2d plea, actio non, as ante, 421. third precedent.*] Because he says, that after he the said *C D* became assignee of the said demised premises as in the said declaration mentioned, and before any part of the said rent in the said declaration mentioned, became due and owing to the said *A B*, to wit, on, &c. at, &c. aforesaid, he the said *C D* by a certain indenture of assignment, then and there made, and duly signed by him the said *C D*, and sealed with his seal, for the considerations therein mentioned, did, &c. [*state the assignment to the third person and his entry, as in the last precedent, and conclude with a verification, as ante, 422. sixth precedent.*]

Plea by an assignee that he assigned over his interest, before any rent became due. (*g*)

(*g*) See the notes to the last precedent.

On recogni-
sances.
Nul tiel re-
cord. (h)

C D } And the said *C D*, by — his attorney, comes and de-
ats. } fends the wrong and injury, when, &c. and says, that
A B. } there is not any record of the said supposed recognisance
(or if in debt upon a judgment, say, “ of the said supposed re-
covery”) in the said declaration mentioned, remaining in our
said court of our said lord the king, before the king himself,
(or in *C. P.* “ in the said court of our said lord the king of the
bench,”) in manner and form as the said *A B* hath above in
his said declaration alleged, and this he the said *C D* is ready to
verify ; wherefore he prays judgment if the said *A B* ought to
have or *maintain his aforesaid action thereof against him the
said *C D*, &c.

* 489

No capias ad
satisfacien-
dum. (i)

[*Actio non*, as ante, 421. first precedent or third precedent.]
Because he says that after the recovery of the said judgment,
as in the said declaration mentioned, and before the exhibiting
of the bill of the said *A B*, against him the said *C D* in this
behalf, (or if in *C. P.* or by original, “ before the commence-
ment of this suit,”) there was no writ of *capias ad satisfacien-*
dum, sued or prosecuted out of the said court of our said lord
the king, before the king himself, (or “ of the bench afore-
said,”) against the said *C D* upon the said judgment, and duly
returned in the said court, (k) as according to law, and the cus-
tom of the said court from time immemorial, used and ap-
proved of in the said court, before the commencement of this
suit, there ought to have been. And this, &c. [conclude with
a verification, as ante, 422. sixth precedent.]

Death of prin-
cipal before
return of ca.
sa. (l)

[*Actio non*, as ante, 421. first precedent.] Because he says
that after the recovery of the said judgment in the said de-
claration mentioned, and before the return of any writ of

(h) See the precedents indexed, 7 Wentw. 631.

(i) See the precedents indexed, 7 Wentw. 631.

(k) The filing is not material. What follows after this allegation, except the conclusion, being an averment of matter of law, is not ne-

cessary, or perhaps correct ; it is, however, usually inserted.

(l) See the precedents, 7 Wentw. 631. 2 East, 312. 4 T. R. 587. 1 Wils. 334. If the principal died after the return of the *ca. sa.* and before the return is filed, the bail are fixed, 6 T. R. 284.

rapias ad satisfaciendum thereupon against the said *E F*, (the principal) at the suit of the said *A B*, upon the said judgment, to wit, on, &c. he the said *E F* did, to wit, at, &c. aforesaid. And this, &c. [conclude with a verification, as ante, 422. sixth precedent.]

[First plea, nul tiel record, as ante, 488. Second plea, *actio non*, as ante, 421. third precedent.] Because he says, that after the recovery of the said judgment, and before the exhibiting of the bill of the said *A B* against the said *C D* in this behalf, (or if in *C. P.* or by original, "before the commencement of this suit,") to wit, on, &c. at, &c. aforesaid, he the said *C D* paid and satisfied to the said *A B* the said sum of —*l.* in form aforesaid recovered. And this, &c. [conclude with a verification, as ante, 422. sixth precedent.]

On recognisances.

To debt on judgments.

Payment. (m)
* 490

See the pleas in debt on judgments in general, *Com. Dig. Other pleas Pleader*, 2 *W.* 13. The plea of *nul tiel record* is in form, as ante, 488. The defendant cannot plead accord and satisfaction, because the stat. of 4 *Ann.* c. 16. s. 12. only authorises a plea of payment, 3 *East*, 251. To debt on judgment against an executor suggesting a *devastavit*, he may plead not guilty, 1 *Saund.* 219. n. 7.

[*Actio non*, as ante, 421. first precedent.] Because he says, that one *E F*, before the commencement of this suit, to wit, on, &c. in the — year of the reign of our lord the now king, sued and prosecuted out of the court of our said lord the king, before the king himself, against the said *C D* a certain precept, (or writ, &c. according to the fact,) (o) of our said lord the king, called a bill of *Middlesex*, with intent to declare thereon, as hereinafter mentioned, by which said precept the sheriff of the said county of *Middlesex*, was commanded that

On statutes.

Plea to an action for bribery that a prior suit is depending for the same offences. (n)

(m) This plea is given by 4 *Ann.* c. 16. s. 12.

(n) See the precedents, 7 *Wentw.* 632, 633. The pendency of a prior suit in a penal action may be pleaded in

bar, *Sayer's Reports*, 216. *Bac. Abr.* Actions, *qui tam*, D. The defendant cannot plead double in a penal action.

(o) State the process, as ante, 162. 166, 167.

On statutes. he should take the said *C D* if he should be found in his bailiwick, and keep him safely, so that he might have his body before our said lord the king at *Westminster*, on — next after —, to answer to the said *E F* in a plea of trespass ; and the said *C D* further saith, that afterwards, and before the commencement of this suit, and before the said return of the said precept, to wit, on, * &c. at *Westminster*, in the county of *Middlesex*, he the said *C D* was duly served, with a copy of the said precept, with a notice thereto subscribed, according to the course and practice of the said court ; (h) and that afterwards, that is to say, on, &c. in the — year of the reign aforesaid, in the court of our said lord the king, before the king himself, came the said *E F* by his attorney, and the said *C D* by his attorney aforesaid also came, according to the exigency of the said precept, and thereupon the said *E F* exhibited and filed his certain bill, upon and by virtue of the said precept, against the said *C D* of a plea of debt, for —*l.* for and in respect of divers supposed premises of —*l.* each, in that bill alleged to have been incurred by the said *C D* for certain offences supposed to have been committed by the said *C D*, contrary to the form of the statute in such case made and provided, and the said *E F* then and there found pledges to prosecute his said bill, to wit, John Doe and Richard Roe, (g) and after stating in the said bill, amongst other things, that before and at the time of the committing of the several supposed offences thereafter mentioned, an election of two burgesses to serve as burgesses for the borough of —, in the county of —, in the parliament of the united kingdom of *Great Britain and Ireland*, was expected shortly to be had and made, and that before and until, and at such election the said *C D* was a candidate, that he might be elected one of the said burgesses, to serve in parliament for the said borough, the said *E F* in the — count of his said bill, complained against the

(p) This allegation is inserted in this precedent ; but this does not seem to be necessary ; and the averment that the two suits were for the same offences, will suffice, see the next precedent, and *ante*, 418. n. (t).

(g) It has been usual to set forth the declaration in the former suit, as

the same offences, will suffice, see the next precedent, and *ante*, 418. n. (t).

said *C D*, for that the said *C D*, before the said election, to wit, *On statutes.*
 on, &c. at the borough aforesaid, in the county aforesaid, did
 *unlawfully corrupt one *G H*, who then claimed a right to vote * 492
 in elections for members to serve in parliament for the said
 borough, by then and there unlawfully and corruptly giving to
 the said *G H* a certain sum of money, to wit. the sum of —*l.*
 as a gift and reward for him the said *G H*, to give his vote in
 that election for the said *C D*, contrary to the form of the
 statute in such case made and provided. And in the —
 count of the said bill, the said *E F* also complained against the
 said *C D*, for that, &c. (*here state all the counts in the action at*
the suit of E F which were for the same penalties as those men-
tioned in the present suit, and then proceed as follows :) and the
 said *E F* in each and every count of his said bill, after stating
 the supposed defence in such count specified, alleged that an
 action had thereby, and by force of the statute in such case
 made and provided, accrued to him the said *E F* to demand,
 and have of and from the said *C D* the said sum of —*l.* and
 which said action so commenced by and at the suit of the said
E F against the said *C D* as aforesaid, for the several penalties
 in his said bill mentioned, is now depending in the said court of
 our said lord the king, before the king himself, and wholly
 undetermined, to wit, at, &c. aforesaid. And the said *C D*
 further says, that the said *C D* named in the said precept
 and bill of the said *E F*, and he the said *C D*, the now defend-
 ant, named in the said bill of the said *A B*, are one and the
 same person, and not other or different persons, and that the
 said supposed offences mentioned in the said counts of the
 said bill of the said *E F*, though stated with small and imma-
 terial variances, with respect to the names of the persons
 supposed to have been bribed, and otherwise are the same
 identical offences as are mentioned and alleged to have been
 committed in the said bill of the said *A B*, and are not other
 or different offences. And this, &c. [*conclude with a verifica-*
tion, as ante, 422. sixth precedent.]

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[*Actio non, as ante, 421. first precedent.*] Because he says, that
 after the committing of the said several offences in *the said
 declaration mentioned, and before the exhibiting of the bill of
 the said *A B*, against the said *C D* in this behalf, to wit, on the
 Plea of ano-
 ther action for
 the same of-
 fence, com-
 pounded by
 rule of court

On statutes. — day of — (g) in — term, in the — year of the reign of our lord the now king, one *E F* sued and prosecuted out of the court of our said lord the king, before the king himself, the said court then and still being holden at *Westminster*, in the county of *Middlesex*, a certain writ called a *latitat*, for the purpose of recovering the same several sums of money in the said declaration mentioned, and thereby alleged to be by the said *C D* forfeited; and such proceedings were thereupon had, that afterwards, to wit, on — next after —, in the — year of the reign aforesaid, by a certain rule of the said court, it was ordered that the said *E F* should have leave to compound that action with the said *C D* for the sum of —*l.* and the costs of the said suit to be taxed by the master; as by the said rule now remaining in the said court, more fully appears. And the said *C D* further saith, that the said offences for which the said action so compounded as aforesaid by the said rule of court was brought, and the said offences in the said declaration in this suit mentioned, are the same identical offences, and not other or different offences, to wit, at, &c. aforesaid; and the said *C D* further saith, that in pursuance of the said rule, the said *C D*, afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, did pay to the said *E F* the said last-mentioned sum of —*l.* together with the said sum of —*l.* being the sum taxed by the master for the costs of suit aforesaid, which said sums of —*l.* and —*l.* the said *E F* then and there accepted in full satisfaction and discharge of the said suit, to wit, at, &c. aforesaid. And this, &c. [*conclude with a verification as ante, 422. sixth precedent.*]

Former conviction for the same offence.

And the said *C D* as to the first count of the said declaration says, that the said *A B* ought not to have or maintain his aforesaid action thereof against him. Because he says, *that after the committing the said offence in that count mentioned, and before the exhibiting of the said bill of the said *A B* in this behalf, to wit, on, &c. at, &c. aforesaid, one *E F* went before *G H*, esq. then and still being one of his majesty's justices of the peace for the said county of —, residing

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near the place where the said offence was committed, and informed the said *G H* that the said *C D*, on, &c. then last past, did, &c. (*here state the offence as in the information,*) and thereupon such proceedings were had before the said *G H*, the justice aforesaid, that afterwards, to wit, on, &c. at, &c. aforesaid, the said *C D* was duly convicted of the said offence, according to the form of the statute in such case made and provided; as by the same record in the court of our said lord the now king, of general quarter sessions of the peace, holden in and for the said county of —, more fully appears; which said judgment of conviction is yet in full force and effect, not reversed, quashed, or vacated. And the said *C D* avers, that he the said *C D*, who is sued by the name of *C D* in the said bill of the said *A B*, and the said *C D* in the said information and conviction named, are one and the same person, and not other or different. And that the said offence in the said — count of the said declaration mentioned, and the said offence in the said information charged, and whereof the said *C D* was so convicted as aforesaid, was done and committed by the said *C D*, at one and the same time, and are in fact the very same identical offence, and not other or different offences. And this he is ready to verify; wherefore he prays judgment, if the said *A B* ought to have or maintain his aforesaid action thereof against him, in respect to the said offence in the said — count of the said declaration mentioned, &c. And as to, &c. [*nil debet, as ante, 459. to the other counts.*]

*IN DETINUE.

In the K. B. (or C. P. or Exchequer.)

————— *Term, 48 Geo. III.*

Generalissimæ,
non distinct.
(r)

C D } And the said *C D* by *E F* his attorney, comes and de-
ats. } fends the wrong and injury, when, &c. and saith, that
A B } he doth not detain the said goods and chattels in the said de-
claration specified, or any part thereof, in manner and form
as the said *A B* hath above thereof complained against him,
and of this he the said *C D* puts himself upon the country,
&c.

In the King's Bench, (or C. P. or Exchequer.)

————— *Term, 48 Geo. III.*

In general.
Non est fac-
tum.

C D } And the said *C D* by *E F* his attorney, comes and de-
ats. } fends the wrong and injury, when, &c. and says that the
A B } said indenture [or "*articles of agreement*" or "*deed poll*"] is
not his deed. And of this he the said *C D* puts himself upon
the country, &c.

lea of pay-
ment.

[*Actio non, as ante, 421. first precedent.*] Because he saith,
that the said *C D* on the said, &c. aforesaid, at, &c. aforesaid,

(r) See the precedents of different Detinue, and Com. Dig. Pleader, 2
pleas, in detinue, 7 Wentw. 637. 647 X. 3. &c.
to 662. and see *ante*, vol. 1. Index, tit.

did pay to the said *A B* the said sum of —*l.* in the said indenture mentioned. And of this, he the said *C D* puts himself upon the country, &c. *In general.*

[*Actio non, as ante, 421. first precedent.*] Because he saith that he the said *C D* did, &c. (*here state the performance in the words of the covenant, if such covenant were in the affirmative, and conclude as follows,*) according to the form and effect of the said indenture, and of the said covenant of the said *C D*, by him in that behalf made as aforesaid, to wit, at, &c. aforesaid. And of this he the said *C D* puts himself upon the country, &c. *Plea of performance. (*)*

[*1st plea, non est factum, as supra. 2d plea, as follows:*] *License.*
And for a further plea in this behalf, as to the said supposed *breach of covenant, secondly above assigned, the said *C D* by leave of the court here for this purpose first had and obtained according to the form of the statute in that case made and provided, saith that the said *A B* ought not to have or maintain his aforesaid action thereof against him, because he says that he the said *C D* did plough and break up, &c. (*here enumerate the acts complained of as in the declaration, or if they be very numerous the plea may be more concise and as follows: "that he the said C D did commit the said supposed breach of covenant first above assigned"*) by the leave and license of the said *A B*, to him the said *C D*, for that purpose first given and granted, to wit, on the — day of —, *A. D.* —, at, &c. aforesaid. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*] * 497

[*Actio non, as to the first breach of covenant, as ante, 421.*] *Accord and satisfaction.*
Because he saith that he the said *C D*, before the commencement of this suit, to wit, on, &c. at, &c. aforesaid, paid to the said *A B*, the sum of —*l.* in full satisfaction and discharge of

(*) As to the mode of pleading *nant*, see *ante*, 481 to 486 and vol. 1. performance, whether of an affirmative or negative or disjunctive covenant. Index, tit. Performance, and Comparative Dig. Pleader, 2 V. 13.

In general. the said sum of —*l.* in the said breach of covenant mentioned and of all the damages by the said *A B* sustained, by reason of the non-payment thereof, which said sum of —*l.* the said *A B*, then and there accepted and received of and from the said *C D*, in full satisfaction and discharge of the said sum of —*l.* in the said breach of covenant mentioned, and of the damages of the said *A B* by him sustained, by reason of the said breach of covenant. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

Observations
thereon.

As *rien in arriere* is a bad plea in covenant for rent, &c. *Cowp.* 588. therefore when the defendant has neglected to pay the money at the appointed day, but has paid it afterwards, this plea is proper. It is also advisable when in covenant the defendant brings money into court. See another form of accord and satisfaction, 3 *East*, 252.

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Tender, as to
part.

C D }
ats. } *And the said *C D* by *E F* his attorney, comes and de-
A B. } fends the wrong and injury, when, &c. and as to the
said supposed breach of covenant first above assigned, so far
as the same relates to 8*l.* (*the sum tendered*) parcel of the said
sum of 50*l.* in the said declaration mentioned, saith, that the
said *A B* ought not to have or maintain his aforesaid action
thereof against him, to recover any more or greater damages
than the said sum of 8*l.* on occasion of the said supposed
breach of covenant in this behalf, because he saith, that after
the time when the said sum of 8*l.* parcel, &c. became due and
payable from the said *C D*, and before the exhibiting of the
bill of the said *A B* against him the said *C D*, in this behalf,
(*or if in C. P. or by original, "before the commencement of this
suit,"*) to wit, on the — day of —, *A. D.* —, at, &c.
aforesaid, he the said *C D* was ready and willing, and then and
there tendered and offered to pay to the said *A B* the said
sum of 8*l.* parcel, &c. to receive which of the said *C D*, he
the said *A B* then and there wholly refused, and the said *C D*
further saith, that he the said *C D* hath always, from the time
when the said sum of 8*l.* became due and payable, hitherto, at,
&c. aforesaid, been ready to pay, and still is there ready to pay
to the said *A B* the said sum of 8*l.* parcel, &c. and he now

brings the same here into court, ready to be paid to the said *A B*, if he will accept the same. And this he the said *C D* is ready to verify; wherefore he prays judgment if the said *A B* ought to have or maintain his aforesaid action thereof against him to recover any more or greater damages than the said sum of 8*l.* on occasion of the said supposed breach of covenant first above assigned in this behalf, &c. [*Set-off as to the residue of the money breach, as post, 499.*]

And the said *C D* by *E F* his attorney, comes and defends the wrong and injury, when, &c. and saith that the said *A B* ought not to have or maintain his said action thereof against him, to recover any more or greater damages than the said sum of 5*l.* because he saith, that he the said *C D* was present at the said demised dwelling-house, on the said — day of —, *A. D.* —, being the day on which the said sum of 5*l.* became due and payable, as aforesaid, for a long space of time, to wit, for the space of three hours next before the setting of the sun in the same day, and also at the setting of the sun in the same day, and during all the time aforesaid, was there ready to pay and offered to pay the said 5*l.* to him the said *A B*, but that neither he the said *A B*, nor any other person on his behalf, during the said time, or any part thereof, was there ready to receive the same; and the said *C D* further saith, that he the said *C D* hath always since that day, at, &c. aforesaid, been and still is ready to pay the same to the said *A B*; and the said *C D* now brings the said sum of 5*l.* here into court ready to be paid to the said *A B*, if he will accept the same. And this he the said *C D* is ready to verify; wherefore he prays judgment if the said *A B* ought to have or maintain his said action thereof against him, to recover any more or greater damages than the said sum of 5*l.* in this behalf, &c.

Plea to covenant for rent, a tender on the land before sun set.

(1) * 499

And the said *C D* as to the said supposed breach of covenant first above assigned, (*this must be according to the fact, a*

Set-off.

(1) See the precedent, Plead. see Bac. Abr. Tender, H. 1. Assistant, 341. And as to the law,

In general. set-off can only be pleaded to a breach of covenant to pay money,) says, (*actio non, as ante, 421. first precedent.*) Because he saith, that the said *A B*, before and at the time of the commencement of this suit, was and still is indebted to the said *C D*, in a large sum of money, to wit, the sum of —*l.* for, &c. (*here state the subject matter of the set-off, as in the precedent, ante, 442 to 448.*) to wit, at, &c. aforesaid, which said sum of money so due and owing from the said *A B* to the said *C D*, exceeds the damages sustained by the said *A B*, on occasion of the said supposed breach of covenant first above assigned as to the said sum of —*l.* and out of which said sum of money so due and owing from the said *A B* to the said *C D*, *as aforesaid, he the said *C D* is ready and willing, and hereby offers to set off and allow to the said *A B*, so much as will be sufficient to satisfy the damages by him sustained, on occasion of the said supposed breach of covenant first above assigned, according to the form of the statute in such case made and provided, &c. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

Plea that lessor was seised for life, and not in fee.(u)

[*Actio non, as ante, 421.*] Because he saith that the said *E F* deceased, at the time of the making of the said indenture, was seised only in his demesne, as of freehold, for the term of his natural life, of and in the said demised premises with the appurtenances, and continued so seised thereof, until and at the time of his death, and that after the making of the said indenture, and before the expiration of the said term, to wit, on, &c. at, &c. aforesaid, the said *E F* died; whereupon the said indenture, and the term thereby created wholly ceased and determined; without this, that at the time of the making of the said indenture, the reversion of and in the said demised premises with the appurtenances, belonged to the said *E F* and his heirs, in manner and form as the said *A B* hath above

(u) See 2 Wils. 143. in which to traverse of the lessor's estate, or that covenant by an heir, a similar plea he had only an *equitable* interest, but was held sufficient on demurrer, and he may shew that the lessor was entitled to a *different* estate, see 2 Stra. 817. 3 T. R. 487. 1 New Rep. 160. 2 Saund. 207. b. 415. n. 1.

in his said declaration in that behalf alleged. And this, &c. *In general*
[conclude with a verification, as ante, 422. sixth precedent.]

[*Actio non, as ante, 421. first precedent.*] Because he saith that all the estate, right, title, interest, and term of years then to come and unexpired, property, claim, and demand whatsoever of the said *E F*, of and in the said premises with the appurtenances, by assignment thereof duly made, did not come to and vest in the said *C D*, *in manner and form as the said *A B* hath in his said declaration in that behalf alleged. And of this he the said *C D* puts himself upon the country, &c.

Plea by assignee traversing the assignment to him. (x)

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[*Actio non, as ante, 421. first precedent.*] Because he saith, that the said messuage and tenement, farm-house and out-houses thereunto belonging, were not, nor are, nor was, nor is any part thereof ruinous, prostrate, fallen down or out of repair, in manner and form as the said *A B* hath above thereof complained against him the said *C D*, and of this he the said *C D* puts himself upon the country, &c.

Premises not out of repair. (y)

See the pleas to debt on leases, *ante*, 486 to 488. which may readily be adapted to the action of covenant, and see the great variety of pleas in covenant on different deeds, indexed in 5 *Wentw. Index*, 127 to 144. and *Com. Dig. Pleader*, 2 V. 4 to 18. Pleas in covenant so much depend on the particular facts of each case, that it would not be practicable in a concise collection of precedents of this nature to give forms in every case. The few precedents in the preceding pages will suffice.

Other pleas to covenant on leases, charter parties, apprenticeship deeds &c.

(x) The words of the traverse of the assignment are to be in the negative of that part of the declaration.

(y) The plea to the breach of covenant for not repairing should be conformable to the breach, and may

be either that the defendant did repair, &c. in the words of the covenant, or that the premises were not out of repair as above in the negative of the breach, usually assigned in the declaration.

•IN CASE.

In the K. B. (or "C. P." or "Exchequer.")

— Term, 48 Geo. III.

In general.
General issue
in case or over.
(a)

C D } And the said *C D*, by *E F* his attorney, comes and de-
ats. } fends the wrong and injury, when, &c. and says that he
A B. } is not guilty of the premises above laid to his charge, in
manner and form as the said *A B* hath above hereof com-
plained against him. And of this he the said *C D* puts him-
self upon the country, &c.

Statute of li-
mitations. (b)

[*First plea, general issue, as supra. 2d, actio non, as ante, 421. third precedent.*] Because he says, that he the said *C D* was not guilty of the said supposed grievances in the said declaration mentioned, or of any or either of them, at any time within six years next before the exhibiting of the bill of the said *A B* against him the said *C D* in this behalf, (or if in *C. P.* or by original, say, "*next before the commencement of this suit;*") in manner and form as the said *A B* hath above thereof complained against him the said *C D*. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

Accord and
satisfaction.
(c)

[*First general issue, as supra. Second plea, actio non, as ante, 421. third precedent.*] Because he says, that after the committing of the said grievances as aforesaid, and before the exhibiting of the bill of the said *A B* against him the said *C D* in this behalf, (or if in *C. P.* or by original, "*before the commencement of this suit;*") to wit, on, *&c. at, &c. aforesaid, he the said *C D* paid to the said *A B* the sum of —l. of lawful

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(a) As to what may be given in evidence under this plea, see *ante*, vol. I. Index, tit. *General Issue*.

(b) As to this plea, see 6 East, 387.

(c) The subject matter of this plea may be given in evidence under the general issue. 3 Burr. 1353. 1 Bla. Rep. 388. s. c. It is, however, in general advisable to plead it.

money of *Great Britain*, for and in full satisfaction and discharge *In general.* of the said grievances, in the said declaration mentioned, and which said sum of — *l.* he the said *A B* then and there accepted and received of and from the said *C D* in full satisfaction and discharge of the said grievances. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

[*First plea, general issue, as ante, 502. Second plea, as follows:*] And for a further plea in this behalf as to the speaking and publishing of the said several words of and concerning the said *A B* as in the said — counts mentioned, the said *C D* by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, saith that the said **A B* ought not to have or maintain his aforesaid action thereof against him, because he says, that the said *A B* before the speaking and publishing of the said several words, of and concerning him the said *A B*, as in the said — counts mentioned, to wit, on, &c. at, &c. did feloniously steal, take and carry away certain goods and chattels, to wit, — of one *E F* of great value, to wit, of the value of — *l.* wherefore he the said *C D* afterwards, to wit, at the said

Justification of words of theft, that plaintiff was guilty of theft. (d)

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(d) See the precedents and notes, 1 Saund. 234. n. 6. 8 Wentw. Index, 12 to 15. It is necessary to state the specific offence of which the plaintiff has been guilty, together with the time and place in which it was committed, and it must necessarily be that species of offence with which the defendant charged the plaintiff, 1 Saund. 244. n. 6. 1 T. R. 750. and the law does not allow of pleas of justification containing general charges of fraud or felony committed by the plaintiff, because they do not apprise the plaintiff of the specific defence which is intended to be set up, 1 T. R. 748. It was formerly usual in the plea, to repeat the words mentioned in the declaration, but this is no longer the practice, 1 Saund. 244. n. 6. unless the defendant only justifies speaking part of the words in any particular count, in which case

the plea may run thus, "And for a further plea in this behalf, as to the speaking and publishing of the following words in the said — counts mentioned, that is to say, he, &c. (*repeating the words intended to be justified with the innuendoes,*) the said *C D* by leave," &c. If the words mentioned in the declaration amount to a direct charge that the plaintiff had been guilty of some crime, the justification must impute to the plaintiff such guilt, and stating only a cause of suspicion is not in such case sufficient, unless where the defence is, that the defendant only repeated the words of another person, and at the same time named the author of the slander, for which plea see *post*, 506. and which is rather in excuse than in justification.

For slander. several times in the said — counts mentioned, at, &c. aforesaid, did speak and publish the said words of and concerning the said *AB*, as in the said — counts mentioned, as he lawfully might for the cause aforesaid. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

Justification
of words of
perjury that
plaintiff was
guilty of per-
jury.(c)

[*First plea, general issue, as ante, 502. Second plea, actio non, as ante, 503.*] Because he says, that before the speaking and publishing the said words of and concerning the said *AB* in the said — counts mentioned, to wit, on, &c. at, &c. at the assises, then and there holden, before —, then chief justice of our said lord the king, assigned to hold pleas before the king himself, and —, then one of the justices of our said lord the king, assigned to hold pleas before the king himself, justices of our said lord the king, appointed to take the assises for the said county, according to the form of the statute in such case made and provided, a certain issue before then duly joined in an action brought and prosecuted in the court of our said lord the king, before —, and his companions, then justices of our said lord the king of the bench at *Westminster*, in the county of *Middlesex*, by and at the suit of one *EF* as the plaintiff against one *GH* as the defendant, for the supposed breach of certain promises and undertakings alleged by the said *EF* to have been made to him by the said *GH* and not performed, came on to be tried in *due form of law, and was then and there tried by a jury of the country in that behalf, duly taken and sworn between the parties aforesaid, and upon such trial of the said issue, the said *AB* appeared as a witness for and on behalf of the said *EF* the plaintiff in the said action, and the said *AB* was then and there in open court at the said assises holden as aforesaid, before the said —, and —, the justices aforesaid, duly sworn, and took his corporal oath upon the holy gospel of God, to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matters in question in the said issue, (they the said —, and —, then and there having sufficient and competent power and authority

* 505

(c) See the precedents, Ast. Ent. 234. 237. 8 Wentw. Index, 12 to 15. 21. Thomp. Ent. 65. 3 Inst. Cl.

to administer the said oath to the said *A B* in that behalf,) and *For slander.* upon the said trial of the said issue, certain questions then and there became and were material, to wit, whether, &c. (*here state the questions according to the fact, and as they relate to the charge of perjury against the plaintiff,*) and the said *C D* further says, that the said *A B* being so sworn as aforesaid, upon his oath aforesaid, then and there, to wit, on, &c. aforesaid, at, &c. aforesaid, falsely, wickedly, wilfully, maliciously and corruptly, and by his own act and consent, did say, depose, swear and give evidence, amongst other things, at and upon the said trial, to and before the said jurors so sworn to try the said issue as aforesaid, and the justices as aforesaid, that, &c. (*here state that part of the plaintiff's evidence in which he committed perjury.*) Whereas in truth in fact, &c. (*here negative the plaintiff's evidence as in an indictment for perjury.*) And the said *A B* did thereby in the said court at the said assises so holden as aforesaid, upon his said oath upon the trial of the said issue, falsely, wickedly, wilfully and corruptly, commit wilful and corrupt perjury; wherefore the said *C D* at the said several times, when, &c. in the said — counts mentioned, at, &c. aforesaid, spoke and published of and concerning the said *A B*, the said several words in the said — counts mentioned, to have been spoken and published by him the said *C D* of and concerning the said *A B*, as it was *lawful for him to do for the cause aforesaid. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

* 506

[*First plea, general issue, as ante, 502. Second plea, actio non, as ante, 503.*] Because he says, that the said *A B* at the said several times, when, &c. in the said — counts mentioned, at, &c. aforesaid, was in bad and indigent circumstances, and incapable of paying his just debts, to wit, a certain just debt amounting to a large sum of money, to wit, the sum of —*l.* which he then and there owed to one *E F*, for, &c. (*here state the subject matter of the debt,*) and a certain other just debt, amounting to another large sum of money, to wit, the sum of —*l.* which he the said *A B* then and there owed to one *G H*, for, &c. (*enumerating as many debts as can be proved to have been long in arrear.*) And which said several debts

Justification of words of insolvency, that plaintiff was insolvent.

For slander. the said *A B* was then and there unable to pay. And this, &c.
[conclude with a verification, as ante, 422. sixth precedent.]

Plea that a 3d
person was
the author of
the slander
which defend-
ant at the time
of his repeat-
ing it, stated
to the hearers.
(f)

[First plea, general issue, as ante, 502. Second plea, *actio non*, as ante, 503.] Because he says, that before the speaking and publishing of the said several words in the said — counts mentioned, and therein supposed to have been spoken and published by the said *C D*, of and concerning the said *A B*, to wit, on the said several days in the said — counts mentioned, at, &c. aforesaid, the said *C D* had heard from and been told by one *E F*, that, &c. (*here repeat the words precisely as they were used, though it will be sufficient to prove some material part of them, 2 East, 426.*) and that at the time of speaking and publishing the said *several words in the said — counts mentioned as therein mentioned, he the said *C D* also declared in the presence and hearing of the same persons, in whose presence and hearing the said words were so spoken, that he had heard and been told the same from and by the said *E F*; wherefore he the said *C D*, at the said several times, when, &c. in the said — counts mentioned, did speak and publish of and concerning the said *A B*, the said several words in the said — counts mentioned, as he lawfully might for the cause aforesaid. And this, &c. (*conclude with a verification, as ante, 422. sixth precedent.*)

* 507

* 508

*IN REPLEVIN.

In the King's Bench, (or C. P.)

— Term, 48 Geo. III.

In general.
Nom cepit.(a)

C D } And the said *C D* by *E F* his attorney, comes and de-
ats. } fends the wrong and injury, when, &c. and says, that
A B. }

(f) As to this plea and the precedents, see 7 T. R. 17 to 19. 2 East, 426. A plea of this description cannot be supported without its being expressly averred, that the defendant named the author of the slander at

the time he repeated it, and it is not sufficient merely to disclose the name of the author at the time of pleading. *Id. ibid.*

(a) Where the defendant has not in fact taken the goods or cattle, and

he did not take the said cattle, goods and chattels in the said declaration mentioned, or any or either of them or any part thereof, in manner and form as the said *A B* hath above thereof complained against him. And of this he the said *C D* puts himself upon the country, &c.

In the King's Bench, (or C. P.)

— Term, 48 Geo. III.

C D } And the said *C D* by *E F* his attorney, comes and de-
ats. } fends the wrong and injury, when, &c. and well avows
A B. } the taking of the said goods and chattels in the said declaration
mentioned, in the said dwelling-house, in which, &c. and justly,
&c. because he says, that, &c. [*Here follows the subject mat-
ter of the avowry.*]

1st. Com-
mencement of
an avowry. (b)

**C D* } And the said *C D* by *E F* his attorney, comes and de-
ats. } fends the wrong and injury, when, &c. and as the
A B. } bailiff of *G H* well acknowledges the taking of the said goods
and chattels in the said declaration mentioned, in the said
dwelling-house in which, &c. and justly, &c. because he says,
that, &c. [*Here follows the subject matter of the cognisance.*]

* 509
2dly. Com-
mencement of
a cognisance.
(c)

in the case of a pound-keeper, who has merely received them into the pound, Cowp. 476. or where the place of taking the cattle is mistaken, and the defendant never had the cattle in the place named in the declaration, this plea is sufficient, and the plaintiff will be nonsuited thereon, 1 Saund. 347. n. 1. But the defendant cannot have a return of the goods under this plea, and therefore in order to have a return, he must plead that he took the goods in some other place, describing it, and traverse the place laid in the declaration, and in order to have a return, avow or make cognisance, stating the cause for which he distrained, 1 Saund. 347. n. 1. See the precedents, *post*, 510, 511.

(b) As to an avowry in general,

see Com. Dig. Pleader, 3 K. 13, 14, 15. 17. &c. and 1 Saund. 347. &c.

(c) The term "cognisance" imports a justification of the taking in right of another. The words "as bailiff of," &c. are material, and if one avow and the other make cognisance without saying as bailiff of the other, and entire damages be given, it will be error, Yelv. 108. Com. Dig. Pleader, 2 K. 14. The words "as bailiff of *E F*," without shewing the defendant's authority, are sufficient in all cases, 1 Saund. 347. n. 4. And if the defendant say, "well avows," instead of "well acknowledges," it is sufficient, though not technically correct, Cro. Jac. 373. In replevin the acting as bailiff may be traversed, 1 Saund. 347. c. n. 4.

In general.
3dly. Commencement of an avowry by one, and of a cognisance by another.

C D & E F

ats.

A B.

} And the said *C D* and *E F* by *G H* their attorney, come and defend the wrong and injury, when, &c. and the said *C D* in his own right well avows, and the said *E F* as bailiff of the said *C D* well acknowledges the taking of the said goods and chattels in the said declaration mentioned, in the said dwelling-house, in which, &c. and justly, &c. Because they say, that, &c. [*Here follows the subject matter of the avowry and cognisance.*]

4thly. Conclusion of an avowry or cognisance. (*d*)

* 510

And this he the said *C D* is ready to verify; wherefore he prays judgment and a return of the said goods and chattels, together with his damages, &c. (*e*) according to the form of the statute in such case made and provided, to be adjudged to him, &c.

Plea in bar property in defendant or a stranger. (*f*)

[*Actio non, as ante, 421. first precedent.*] Because he saith, that the property of the said goods and chattels, in the said declaration mentioned, at the said time, when, &c. was in the said *C D*, (or "*in one E F*") to wit, at the parish aforesaid, in the county aforesaid; without this, that the property of the said goods and chattels or any part thereof, at the said time, when, &c. was in the said *A B* as by the said declaration is above supposed. And this he the said *C D* is ready to verify; wherefore he prays judgment, and a return of the said goods and chattels to be adjudged to him, &c.

(*d*) It is usual to conclude an avowry or cognisance with a verification, see the precedent, 1 Saund. 347. But these being in the nature of a declaration, need not be averred, Co. Lit. 303. a. Plowd. 145. 168. and it is said to be the best way to conclude each, after shewing the cause of the caption, without any averment or further conclusion. 1 Saund. 347. The stat. 7 Hen. VIII. c. 4. s. 3. and 21 Hen. VIII. c. 19. s. 3. in case any avowry or cognisance for rents, &c. or for damage-tenant, be found for

the defendant, or if the plaintiff be nonsuit or otherwise barred, enact, that defendant recover his damages and costs, the conclusion of the avowry therefore alludes to these statutes.

(*e*) See the last note, the "&c." means "costs and charges by him about his defence in this behalf expended." 1 Saund. 347.

(*f*) As to the mode of pleading property, Bull. N. P. 54. Lil. Ent. 358. 2 Rich. C. P. 357.

C D } *ats.* } [*Actio non*, (*h*) as *ante*, 421. *first precedent.*] Because *In general*
A B. } he saith, that he took the said cattle in the said declara- *Cepit in alio*
tion mentioned, in a certain close, called the —, in the *loco with a-*
parish of — aforesaid, in the county aforesaid, without this, *vowry for re-*
that he took the said cattle, or any or either of them in the said *turn.* (*g*)
place, called the —, in the said parish of —, in the county
aforesaid, as the said *A B* hath in his said declaration in that
behalf alleged. And this he the said *C D* is ready to verify ;
wherefore he prays judgment if the said *A B* ought to have or
maintain his aforesaid action thereof against *him, &c. And
for having a return of the said cattle, the said *C D* well avows
the taking of the said cattle, in the said declaration mentioned,
in the said close called —, (*h*) and justly, &c. Because he saith,
that (*i*) before the said time, when, &c. and at the time of the
making the demise hereinafter mentioned, one *E F* was seised
of and in the said close, called the —, in which, &c. with the
appurtenances in his demesne, as of fee, to wit, in the parish
aforesaid; and being so seised, he the said *E F* before the
said time, when, &c. to wit, on, &c. *A. D.* — aforesaid, in
the parish aforesaid, in the county aforesaid, demised the said
close called —, in which, &c. with the appurtenances, among
other things to the said *C D*, to have and to hold the same
to the said *C D*, for the term of — years thence next ensu-
ing, and fully to be complete and ended: By virtue of which
said demise, he the said *C D* afterwards and before the said
time, when, &c. to wit, on the day and year last aforesaid, en-
tered into the said close, called the —, in which, &c. with
the appurtenances, and became, and until, and at the said time,
when, &c. was lawfully possessed thereof; and because the

* 511

(*g*) See the note to the plea of *non cepit*, *ante*, 508. n. (*a*), and the precedents, Willes, 475. Rast. Ent. 554, 555. Clift. 636. Tidd's Forms, 598. The avowry being only in the nature of a suggestion to entitle the defendant to a return of the cattle, &c. the plaintiff cannot traverse it, but must either take issue on the traverse of the place, or amend his declaration, 1 Saund 347. n. 1. Willes, 475. 2 B. & P. 482.

(*h*) In the forms referred to in

the last note, the defendant prayed judgment of the declaration, but as this plea is in bar, and not in abatement, "*actio non*" seems more proper, 1 Saund. 347. n. 1. Barnes, 353. Willes, 475.

(*h*) The close first mentioned in the avowry.

(*i*) The avowry or cognisance is to be according to the fact, and may be for rent, &c. as in the precedents, *post*, 512. &c. see Willes, 475.

In general.

said cattle in the said declaration mentioned, at the said time, when, &c. were wrongfully and injuriously in the said close called —, and treading down and depasturing the grass and herbage there then growing, and doing damage there to the said *C D*, he the said *C D* well avows the taking of the said cattle, in the said close called —, and justly, &c. as for and in the name of a distress, for the said damage so there done and doing as aforesaid. (k)

* 512

Plea admitting that defendant had the cattle in locus in quo but took them damage-feasant in another close. (l)

C D } And the said *C D* by *E F* his attorney, comes and de-
ats. } fends the wrong and injury, when, &c. and well avows
A B. } the taking and having the said mare in the said *declaration mentioned, in the said piece or parcel of land called —, as in the said declaration mentioned, and justly, &c. because he says, that, &c. [*Here state a seisin in fee of another close in G H, and a demise thereof to the defendant and his entry, and the distress damage-feasant, as in the last precedent to the end, and then proceed as follows:*] And the said *C D* afterwards and immediately before the said time, when, &c. took and led the said mare from the said close, piece or parcel of ground so demised to him as aforesaid, to the said place in the said declaration mentioned, called the —, in which, &c. and at the said time, when, &c. had the same there in the way from the said close, piece or parcel of ground so demised as aforesaid, to a certain open pound in the parish of —, in the county aforesaid, there to be impounded for the damage so done in the said close, piece or parcel of ground so demised as aforesaid. And this, &c. [*conclude with a verification, as ante, 509.*]

(k) This conclusion without a he took them for rent or damage-verification is proper, 1 Saund. 347. *feasant* in another close, he cannot n. 7. *Ante*, 509. n. (d).

(l) See the notes to the plea of *non cepit*, *ante*, 508. and *cepit in alio loco*, *ante*, 510. If the defendant have had the cattle in the place mentioned in the declaration, though but must plead as above, and see the precedents, 1 Saund. 347. a. 2 B. & P. 480. 3 Wils. 295. 2 Wils. 219.

[Commencement of avowry or cognisance, as ante, 508, 509.] *For rent, &c.*
 Because he says, that the said *A B*, (or "*one J K*,") for a long Common a-
 time, to wit, for the space of — years, next before, and end- vovry or cog-
 ing on the — day of —, *A. D.* —, and from thence nissance for
 until and at the said time, when, &c. held and enjoyed the rent.(m)
 said dwelling-house, in which, &c. with the appurtenances as
 tenant thereof to the said *C D* (or "*G H*,") by virtue
 of a certain demise thereof to him the said *A B* (or "*the*
said J K") theretofore made at and under a certain yearly
 rent, to wit, the yearly rent of —*l.* payable quarterly, on, &c.
 *(*stating the days of payment*) in every year, by even and equal * 513
 portions,† and because the sum of —*l.* of the rent aforesaid,
 for the said space of —, ending as aforesaid, on the said
 — day of —, in the year aforesaid, and from thence,
 until, and at the said time, when, &c. was due and in arrear
 from the said *A B* to the said *C D*, (or "*G H*," in a *cogni-*
sance,) he the said *C D* well avows, (or if a *cognisance*, "*as*
bailiff of the said G H well acknowledges,") the taking of the
 said goods and chattels in the said dwelling-house, in which,
 &c. and justly, &c. as for and in the name of a distress, for the
 said rent so due and in arrear to the said *C D* (or "*G H*") as
 aforesaid. And this, &c. [*conclude with a verification, as ante,*
 509.]

[Commencement of avowry or cognisance, as ante, 508, 509.] *The like in a*
 Because he says, that he the said *C D* for a long time, to wit, more general
 for all the time during which the rent hereinafter mentioned form.
 was accruing due, and from thence, until, and at the said time,
 when, &c. was landlord to the said *A B* of the said dwelling-
 house, in which, &c. and that the said *A B* for a long time,
 to wit, for the space of half a year, ending on, &c. and from
 thence, until, and at the said time, when, &c. held and en-
 joyed the said dwelling-house, in which, &c. with the appurte-

(m) This general avowry is given title, in order that a traverse of a
 in case of distresses for rent, &c. by particular part of it may be taken,
 11 Geo. II. c. 19. s. 22. See 2 Saund. and that the parties may proceed to
 284. c. n. 3. It is however some- trial upon some particular point in
 times advisable to draw the avowry issue. 2 Saund. 284. d.
 as at common law, setting out the

For rent, &c. nances as tenant thereof to the said *A B*, under a certain demise thereof theretofore made, at and under, &c. [*as in the last precedent to the end.*]

Avowry
where part of
the rent has
been satisfied.
(n)

* 514

[*Same as the precedent, ante, 512. to the obelisk.*] And because —*l.* parcel of the sum of —*l.* of the rent aforesaid, for the said space of — ending as aforesaid, *on the said — day of —, in the year aforesaid, and from thence until and at the said time, when, &c. were due and in arrear from the said *A B* to the said *C D*, (the residue of the said sum of —*l.* of the rent aforesaid, having been before then paid and satisfied,) he the said *C D* well avows the taking of the said goods and chattels in the said declaration mentioned, in the said dwelling-house, in which, &c. and justly, &c. as for and in the name of a distress for the said sum of —*l.* parcel, &c. so due and in arrear as aforesaid, and which said sum of —*l.* parcel, &c. still remains due and in arrear to the said *C D* as aforesaid. And this, &c. [*conclude with a verification, as ante, 509.*]

Avowry by
one tenant in
common for
rent due to
him. (o)

Commencement of avowry, as ante, 508.] Because he says that he the said *A B* for a long space of time, to wit, for the space of — next before, and ending on the — day of —, *A. D.* —, and from thence, until, and at the said time, when, &c. held and enjoyed one undivided moiety, (the whole into two equal moieties to be divided) of the said dwell-

(n) This form is not strictly necessary, for the plaintiff may avow for an entire year's rent, &c. though only part thereof be due, 3 B. & P. 348. 5 T. R. 248. n. c. 1 Saund. 201. n. 1. 286. n. 8. 6 East, 437. Com. Dig. Pleader, 3 K. 14. but it is better to avow only for the rent which is really due, in order to avoid the expense which may otherwise be occasioned by the defendant's pleading *rien in arrear*, &c. as to that part of the rent which has been satisfied.

(o) See the precedents, 5 T. R. 246. 8 Wentw. 122. Tenants in

common cannot join in an avowry for rent, though they must join in an avowry for damage-feasant, 5 T. R. 246. Sir W. Jones, 253. 2 H. Bl. 386. The avowry for rent must be *de una medietate* of the whole rent, and not of a certain sum which amounts to a moiety, Carth. 289. 1 Ld. Raym. 423. 1 Salk. 391. 5 Mod. 25. Bac. Abr. tit. Joint-tenant, &c. K. In 3 Salk. 207. 5 T. R. 247. it is said if three tenants in common distrain 30 beasts, they must each of them avow separately for ten.

ing-house, in which, &c. with the appurtenances, as tenant thereof to the said *C D*, under and by virtue of a certain demise thereof to him the said *A B*, theretofore made at and under the yearly rent of —*l.* payable quarterly, on the, &c. (*stating the entire rent, and the days of payment,*) in every year, by even and equal portions; and because one undivided moiety of the sum of —*l.* of the rent aforesaid, for the space of —, ending as aforesaid, on the said — day of —, *A. D.* — aforesaid, and from thence, until, and at the said time, when, &c. was due and in arrear from the said *A B* to the said *C D*, he the *said *C D* well avows the taking of the said goods and chattels in the said declaration mentioned, in the said dwelling-house, in which, &c. and justly, &c. as for and in the name of a distress for the said undivided moiety of the said rent so due, and in arrear, and unpaid as aforesaid, and this he the said *C D* is ready to verify; wherefore he prays judgment, and a return of the said goods and chattels, together with his damages, &c. according to the form of the statute in such case made and provided, to be adjudged to him, &c. And for a cognisance in this behalf, the said *C D* by leave of the court here, for this purpose had and obtained according to the form of the statute in such case made and provided, as bailiff of *G H*, well acknowledges the taking of the said goods and chattels in the said declaration mentioned, in the said dwelling-house, in which, &c. and justly, &c. Because he says, &c. [*cognisance as bailiff of the other tenant in common for an undivided moiety of the rent due to him, similar to the above avowry, and see ante, 513. as to the language of the cognisance.*]

515

Cognisance
by him as
bailiff of the
other tenant
in common.

[*First plea, general issue, (h) as ante, 508. Second plea as follows:*] And for an avowry in this behalf, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, the said *C D*, as churchwarden of the parish of —, in the

Avowry for
poor's rate.

(p) The stat. 43 Eliz. c. 2. s. 19. case of a distress for poor rates, and gives the general issue not guilty in also the above special plea.

Damage-feasant.

* 516

county of — aforesaid, and the said *E F*, as overseer of the same parish, well avow the taking of the said stack of hay of the said *A B*, in the said declaration mentioned in the said place in which, &c. and justly, because they say that the seizing, taking, and detaining of the said stack of hay as in the said declaration mentioned, were done by them the said *C D* and *E F*, by authority of a certain act of parliament made in the parliament of the lady *Elizabeth*, late queen of *England*, holden at *Westminster* in the county of *Middlesex*, *intituled "An act for the relief of the Poor," and according to the tenor, purport, and effect of the same act. And this, &c. [*conclude with a verification, as ante, 509.*]

Avowry by a freeholder under a distress damage-feasant. (g)

[*Commencement of avowry, as ante, 508.*] Because he saith, that the said place, in which, &c.(r) now is and at the said time, when, &c. was the close, soil and freehold of him the said *C D*, (s) and because the said cattle, at the said time, when, &c. were in the said place, in which, &c. eating up the grass there then growing, and doing damage there to the said *C D*, he the said *C D* well avows the taking of the said cattle in the said place, in which, &c. and justly, &c. as for and in the name of a distress for the said damage so there done and doing as aforesaid. And this, &c. [*conclude with a verification, as ante, 509.*]

The like by a tenant from year to year. (t)

[*Commencement of avowry or cognisance, as ante, 508, 509.*] Because he says that *G H*, before the said time, when,

(g) As to this plea in general, see 1 Saund. 347. d. n. 6. It is necessary to set forth the nature of the plaintiff's title, and it is not sufficient, as in trespass, merely to say that defendant was lawfully possessed, &c. 2 B. & P. 359. 2 Saund. 284. d. 285. 1 Saund. 347. d.

(r) Where the defendant is only seized of part of the field, &c. mentioned in the declaration, it is necessary in the avowry to qualify the statement of the seisin accordingly, 1 Saund. 347. d. n. 5.

(s) In an avowry by a freeholder, the words *close, soil* and *freehold* are sufficient, 1 Saund. 347. d. n. 6. As to freehold in right of wife, and pleading title in general, *ante*, 200 to 233.

(t) It is not sufficient merely to state that the defendant was *lawfully possessed, &c.* but the seisin in fee, and the demise must be stated according to the fact, 2 B. & P. 359. 2 Saund. 284. d. 285. See the mode of stating different seisins in fee, and demises by lease, &c. *ante*, 200 to 233. and the Index, tit. *Title Plead- ed.*

&c. and at the time of the making of the demise hereinafter mentioned, was seised of and in the said place, in which, &c. with the appurtenances, in his demesne as of fee. And being so seised, he the said *G H* before the said time, when, &c. to wit, on, &c. at, &c. aforesaid, demised the said place, in which, &c. with the appurtenances, to the *said *C D*, to have and to hold the same to the said *C D*, for one whole year from thence next ensuing, and fully to be complete and ended, and so from year to year as long as they the said *G H* and *C D* should respectively please; by virtue of which said demise he the said *C D* afterwards, and before the said time, when, &c. to wit, on, &c. last aforesaid, entered into the said place in which, &c. with the appurtenances, and became, and until, and at the said time, when, &c. was possessed thereof; and because the said cattle in the said declaration mentioned at the said time, when, &c. were wrongfully in the said place, in which, &c. treading down and depasturing the grass there then growing, and doing damage there to the said *C D*, he the said *C D* well avows the taking of the said cattle in the said place, in which, &c. and justly, &c. as for and in the name of a distress for the said damage so there done and doing as aforesaid. And this, &c. [*conclude with a verification, as ante, 509.*]

* 517

[*Commencement of avowry or cognisance, as ante, 508, 509.*] Because he says, that the said place in which, &c. now is, and from time whereof the memory of man is not to the contrary, hath been, and still is, situate within the manor of, &c. [*here state that the locus in quo was copyhold, and the admission of the copyholder, and the entry of such copyholder, as ante, 206. and then state the demise from year to year to the defendant, and the distress damage-feasant as supra, 516, 517. and conclude with a verification, as ante, 509.*]

The like as a copyholder, or as his tenant.

Damage-feasant.

Avowry for a distress damage-feasant by a freeholder having right of common in the locus in quo.
(u)

* 518

Prescriptive right of common.

[Commencement of avowry or cognisance, as ante, 508, 509.]

Because he says, that before and at the said time, when, &c. he the said *C D* was and still is seised in his demesne *as of fee, of and in a certain messuage and land, with the appurtenances, situate, lying, and being in the parish of — aforesaid, and before, and at the said time, when, &c. was in the actual occupation thereof; and that he the said *C D*, and all those whose estate he now hath and at the said time, when, &c. had, of and in the said messuage and land with the appurtenances, for the time being, from time whereof the memory of man is not to the contrary, have had, and have been used and accustomed to have, and of right ought to have had, and the said *C D* still of right ought to have for himself and themselves, his and their tenants and farmers, occupiers of the said messuage and land with the appurtenances, common of pasture in, upon, and throughout the said place in which, &c. called —, for all his or their commonable cattle, *levant and couchant*, in and upon the said messuage and land, with the appurtenances, in every year, at all times of the year, as to the said messuage or tenement and land, with the appurtenances belonging and appertaining. And because the said cattle in the said declaration mentioned, at the said time, when, &c. were in and upon the said place, in which, &c. called —, depasturing and destroying the grass, there then growing and being, and doing damage there, so that the said *C D* could not have or enjoy his said common of pasture there, in so ample a manner as he ought to have had and enjoyed the same, he the said *C D* well avows the taking of the said cattle, in the said declaration mentioned, in and upon the said place in which, &c. called —, and justly, &c. as for and in the name of a distress for the said damage so there done and doing as aforesaid. And this, &c. [*conclude with a verification, as ante, 509.*]

(u) See the several avowries and cognisances indexed in 8 Wentw. 144 to 227. This precedent will suffice to shew the mode in which an avowry, damage-feasant by a commoner, states the facts, and see 1 Saund. 346. n. 2. The different forms of plead-

ing title, ante, 200 to 233. and the precedents post, in trespass, will sufficiently enable the pleader to frame any other avowry or cognisance, which may occur in the ordinary course of practice.

*IN TRESPASS.

In the King's Bench, (or "C. P." or "Exchequer.")

— Term, 48 Geo. III.

In general.

C D } And the said *C D* by *E F* his attorney, comes and de-
ats. } fends the force and injury, when, &c. and says that
A B. } he is not guilty of the said supposed trespasses above laid to
his charge, or any part thereof, in manner and form as the
said *A B* hath above thereof complained against him. And
of this he the said *C D* puts himself upon the country, &c.

General Is-
sue. (x)

C D } And the said *C D* by *E F* his attorney, comes and de-
ats. } fends the force and injury, when, &c. and as to the
A B. } coming with force and arms, &c. and whatever else is against
the peace of our lord the now king, and as *to all the supposed
trespasses in the said declaration mentioned, except as to the

The like to a
part, with a
special plea to
the residue.
(y)

* 520

(x) Very few matters of defence can be given in evidence under this plea, which in general merely puts in issue the facts stated in the declaration. In trespass for injuries to the person matters in justification or excuse must be pleaded specially, and in trespass to personal property the same rule prevails, except in the instance of a distress for rent, which, when made upon the demised premises, may be given in evidence under the general issue, 11 Geo. II. c. 19. s. 21. 1 Esp. Rep. 257. In trespass to real property, the defendant may, under this plea, give in evidence his right of possession of the *locus in quo*. 7 T. R. 354. 8 T. R. 403. Rights of way and other easements must be pleaded specially. As

to this plea in general, see *ante*, vol. 1. Index, tit. *General Issue*.

(y) Before the statute 4 Ann. c. 16. which allows several pleas in courts of record by leave of such courts, this was the usual mode of pleading where the defendant could not justify all the trespasses mentioned in the declaration, 1 Saund. 10. 24. 82. 296. and where the defendant may not be able to obtain leave to plead double, this mode may still be adopted, and in order to save costs, it is frequently advisable to confine the plea of not guilty to the trespasses which can be justified, leaving the plaintiff at liberty to take judgment and execute a writ of inquiry as to the trespasses which cannot be justified, as in 2 East, 88.

In general. breaking and entering the said close, called, &c. and the said other close called, &c. in the said first and second counts of the said declaration mentioned, and in which, &c. and the several trespasses supposed to have been committed by the said *C D*, therein says that he is not guilty thereof in manner and form as the said *A B* hath above thereof complained against him. And of this he puts himself upon the country, &c. And as to the residue of the said supposed trespasses in the said declaration mentioned, the said *C D* saith, that the said *A B* ought not to have or maintain his aforesaid action thereof against him, because he saith that, &c. [*here state the subject matter of the defence.*]

Accord and satisfaction, and arbitrament.

The plea of accord and satisfaction in trespass, is similar to that in case, *ante*, 502. adopting the term "trespasses" instead of "grievances." See also the pleas, 5 *East*, 294. As to the plea of arbitrament, see *ante*, in *assumpsit*, 436. which may be easily applied to trespass.

Tender of amends by a justice of the peace, under 24 Geo. II. c. 44. s. 2.(z)

[*First plea, general issue, as ante*, 519.] And for a further plea in this behalf, as to the said assaulting, beating, and ill-treating the said *A B*, and imprisoning him, and keeping and detaining him in prison for the said space of time in the said declaration mentioned by him the said *C D*, above supposed to have been done, &c. he the said *C D*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in that case made and provided, says that the said *A B* ought not to have or maintain his aforesaid action thereof against him, because he says, that he the said *C D* at the said time, when, &c. was, and long before had been, a justice of our lord the now king, assigned to keep the peace of our said lord *the king, in and for the said county of —, and also to hear and determine divers felonies, trespasses, and other misde-

* 521

(z) The statute also authorises the plea of general issue. As to this plea in general, *Bac. Abr. Tender*, P. 6. and the precedents, 9 *Wentw. Index*, 132. In another precedent it was thought to be advisable in a

third plea to plead the tender of the 20s. mentioned in the act for the preparing and serving the notice of action, together with the sum tendered as amends for the trespass.

meanors done and committed within the said county. And *In general.* the said *C D* further says, that the said trespasses in the said declaration mentioned, above supposed to have been committed by him the said *C D*, were done and committed by him the said *C D*, in the execution of his said office of justice of the peace within the said county, after the 24th day of *June*, 1751, and that he the said *C D* after the committing of the said trespasses by him above supposed to be done, and before the exhibiting of the bill of the said *A B* against him the said *C D* in this behalf, (or if in *C. P.* or by original, "before the commencement of this suit,") and within one calendar month next after any notice in writing of any writ or process intended to be brought against him the said *C D* by the said *A B* for the cause aforesaid, that is to say, on the — day of —, *A. D.* —, at, &c. aforesaid, tendered and offered to pay to the said *A B* the sum of —*l.* of lawful money of *Great Britain*, as and for amends for the said trespasses, which said sum of —*l.* so tendered and offered as aforesaid, was sufficient amends for the said trespasses, and which said sum of —*l.* so tendered in amends for the said trespasses, the said *A B* then and there wholly refused to accept and receive. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

[*Actio non, as ante, 421. first precedent.*] Because he says, that he the said *C D*, at the said times, when, &c. had not nor claimed to have, nor bath he, nor doth he now claim to have, but disavoweth and disclaimeth to have any title or interest in the said closes, in which, &c. and the said *C D* further saith, that the said cattle in the *said declaration mentioned, a little before any of the said times, when, &c. had, without the knowledge and against the will of him the said *C D*, strayed and escaped into the said closes of the said *A B*, in which, &c. and at the said times when, &c. were in the said

Plea of disclaimer of title to locus in quo and tender of amends.
(a)

* 522

(a) See the precedents, 9 Wentw. Index, 132. In trespass to land, this plea is given by 21 Jac. I. c. 16. s. 5. See the cases thereon, Com. Dig. Pleader, 3 M. 36. Vin. Abr. Trespass, S. a. 542. Bac. Abr. Tender, P. S. Notwithstanding the case in 3 Lev. 37. it is doubted whether a tender of amends can be pleaded for any other trespasses than those committed by cattle, and see Stra. 549. and Vin. Abr. Trespass, S. a. 542

In general.

closes, in which, &c. doing damage there, as in the said declaration is mentioned; wherefore he the said *C D*, as soon as he had knowledge thereof, to wit, at the said several times, when, &c. in order to prevent further damage there to the said *A B*, and to drive his said cattle out of the said closes, entered the said closes, in which, &c. by the most convenient and proper ways, there for the purpose of driving the said cattle out of the said closes, and then and there, at the said times, when, &c. did drive them out of the said closes of the said *A B*, in which, &c. by the most proper and convenient ways there, as it was lawful for him to do, he doing as little damage on those occasions as he possibly could, and in so doing he the said *C D*, with his feet in walking, necessarily and unavoidably trod down, trampled upon, consumed and spoiled, a little of the oats of the said *A B*, there then growing and being. Which are the same trespasses in the said declaration mentioned, and whereof the said *A B* hath above thereof complained against him the said *C D*. And the said *C D* further saith, that after the committing of the said several trespasses, and before the day of the exhibiting of the bill of the said *A B* in this behalf, (or if in *C. P.* or by original, "before the commencement of this suit,") to wit, on, &c. at, &c. aforesaid, he the said *C D* tendered and offered to pay to the said *A B* the sum of —*l.* of lawful money of *Great Britain*, in full satisfaction of the said several trespasses in the said declaration mentioned, the said sum of —*l.* then and there being sufficient amends for the said trespasses, which said sum of money he the said *A B* then and there wholly refused, and still doth refuse to accept of the said *C D*. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

* 523

Statute of limitations. (b)

*[*First plea, general issue, as ante, 519.*] And for a further plea in this behalf, as to the said supposed trespasses in the said declaration mentioned, the said *C D* by leave of the court here for this purpose first had and obtained, according to the form of the statute in that case made and provided, saith that the

(b) 21 Jac. I. c. 16. s. 3. See observations on this statute, 6 East, 390.

said *A B* ought not to have or maintain his aforesaid action *in general* thereof against him; because he saith that he the said *C D* was not guilty of the said several supposed trespasses in the said declaration mentioned, or of any or either of them, or of any part thereof, in manner and form as the said *A B* hath above thereof complained against him, at any time within six (or in an action of trespass to the person "four") years, next before the exhibiting of the bill of the said *A B* against the said *C D* in this behalf, (or if in *C. P.* or by original, "next before the commencement of this suit." And this, &c. [conclude with a verification, as ante, 422. sixth precedent.]

C D } [First plea, general issue, as ante, 519.] And for a *To persons.*
ats. } *A B.* } further plea in this behalf, as to the said assaulting, Son assault
 beating, bruising, wounding, (d) and ill-treating the said *A B*, demesne. (c)
 as in the said first count of the said declaration *mentioned,
 and as to the rending, tearing, damaging, and spoiling the
 wearing apparel of the said *A B*, as in that count also mentioned, the said *C D*, by leave of the court here for this purpose had and obtained, according to the form of the statute in that case made and provided, saith that the said *A B* ought not to have or maintain his aforesaid action thereof against him,† because he says that the said *A B*, just before the said

* 524

(c) As to this plea, see Com. Dig. above form; but where the law *prima facie* only authorises an arrest, or touching a person by a *molliter manus imposuit*, if a wounding also be attempted to be justified, the occasion thereof must be specially stated as in the case of an arrest under process, a resistance or attempt to rescue must be stated, as in 1 Saund. 296, 297. id. n. 1. 8 T. R. 78. 299. In defence of the person of the defendant, an assault and battery, &c. may be justified, but in defence of the possession of personal or real property, the defendant must plead *molliter manus imposuit*, see the distinction, 1 Salk. 407. Lutw. 1483. 8 T. R. 78. Com. Dig. Pleader, 8 M. 15.

(d) The statement of the trespasses in the introductory part of the plea will necessarily depend upon the form of the declaration; in a plea of *son assault demesne*, a wounding may be justified in self-defence in the

To persons.
Plaintiff's
first assault.

Defendant's
self-defence.

time, when, &c. in the said first count mentioned, to wit, on the day and year in that count mentioned, at, &c. aforesaid with force and arms, &c. made an assault^(e) upon him the said *C D*, and would then and there have beat, bruised, and ill-treated him the said *C D*, if he had not immediately defended himself against the said *A B*; wherefore he the said *C D* did then and there defend himself against the said *A B*, as he lawfully might for the cause aforesaid; and in so doing did necessarily and unavoidably^(f) a little beat, bruise, wound and ill-treat the said *A B*, and rend, tear, damage, and spoil the said wearing apparel in the said first count mentioned, doing no unnecessary damage to the said *A B* on the occasion aforesaid, and so the said *C D* saith, that if any hurt or damage then and there happened to the said *A B*, or his said wearing apparel, the same was occasioned by the said assault so made by the said *A B* on him the said *C D*, and in the necessary defence of himself the said *C D* against the said *A B*; which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A B* hath above thereof complained against him the said *C D*. And this, &c. [*conclude with a verification, as ante, 422, sixth precedent.*]

* 525

Molitor manus imposit, to preserve the peace, whereupon plaintiff made an assault on defendant who defended himself.^(g)

*[*First plea general issue, as ante, 519. second plea, son assault demesne, as ante, 523. third plea, as follows:*—And for a further plea in this behalf, as to the said assaulting, beating, bruising, wounding, and ill-treating the said *A B* as in the said first count of the said declaration mentioned, the said *C D* by like leave of the court here for this purpose first had and obtained, according to the form of the statute in that case made and provided, saith that the said *A B* ought not

(e) State the assault or battery, &c. made by the plaintiff upon the defendant according to the facts.

(f) This together with the averment that the trespasses are the same as those complained of in the declaration, according to many of the entries do not appear to be necessary, see the precedents, Winch. 1121. Co. Ent. 644. which merely state that the supposed injury was

occasioned by the plaintiff's first assault, and in self-defence, and conclude with a verification.

(g) See the notes to the precedent, ante, 523, 524. The plea of *son assault demesne*, might in such case be insufficient because the defendant's first interference to preserve the peace, would in point of law render him the first assaulter.

to have or maintain his aforesaid action thereof against him, be- *To persons.*
 cause he saith that (*here state the molliter manus imposuit to pre-*
serve the peace, as in the precedents, post, 526 and 527. to the t,
and then proceed as follows :) Whereupon the said *A B* then
 and there, with force and arms, &c. made an assault upon the
 the said *C D* and would then and there have beat, bruised,
 and ill-treated him the said *C D* if, &c. [*state the self-de-*
fence, &c. and conclude as in the last precedent.]

[*First plea, general issue, as ante, 519. Second plea, as in the* Son assault in
precedent, ante, 523, 524. to the obelisk, and then as follows :]*—*Be-
 cause he saith that the said *A B* just before the said time,
 when, &c. in the said first count mentioned, to wit, on the
 same day and year in that count mentioned, at, &c. afore-
 said, with force and arms, &c. made an assault upon *E F* then
 and there being the father of the said *C D*, and would then
 and there have beat, bruised and ill-treated him the said *E F*
 if he the said *C D* had not immediately defended the said
E F; wherefore he the said *C D* did then and there defend
 the said *E F* so then and there being his father as aforesaid,
 against the said *A B*, as he lawfully might for the cause
 aforesaid, and in so doing did necessarily and unavoidably a
 little beat, *bruise, wound and ill-treat the said *A B*, and rend,
 tear, damage, and spoil the said wearing apparel in the said
 first count mentioned, doing no unnecessary damage to the
 said *A B* on the occasion aforesaid; and so the said *C D*
 says, that if any hurt or damage then and there happened to
 the said *A B* or his said wearing apparel, the same was oc-
 casioned by the said assault so made by the said *A B* upon
 the said *E F* and in the necessary defence of him the said *E F*
 against the said *A B*, which are the same supposed tres-
 passes in the introductory part of this plea mentioned, and
 whereof the said *A B* hath above thereof complained against

* 526

(h) As to pleas of this nature, see the fact, instead of the word "father,"
 Com. Dig. Pleader, 3 M. 15. By this form may be readily applied to
 inserting the words "wife," "mo- any case that may arise. See the
 ther," "son," "daughter," "ser- precedents, Winch. 1121. 9 Wentw.
 vant," or "master," according to Index, 121 to 123.

To persons. him the said *C D*. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

Molliter man-
da to pre-
serve the
peace, plain-
tiff and a third
person having
been fighting
together (i)

[*First plea, general issue, as ante, 519.—Second, as follows:*]
And for a further plea in this behalf, as to the said assaulting, beating, and ill-treating the said *A B* as in the said first count mentioned, the said *C D* by leave of the court here for this purpose first had and obtained, according to the form of the statute in that case made and provided, says that the said *A B* ought not to have or maintain his aforesaid action thereof against him †, because he says that the said *A B* and one *E F* at the said time, when, &c. at, &c. aforesaid, were fighting together, and striving with force and arms to beat and wound each other, against the peace of our lord the now king, whereupon the said *C D* being then and there present, for the preservation of the peace of our said lord the king, and that the said *A B* and *E F* might do no hurt to each other, and in order to separate and part them, then and there gently laid his hands upon the said *A B* as he lawfully might for the cause aforesaid ‡, which are the said assaulting, beating, and ill-treating the said *A B* in the said first count of the said declaration mentioned, and whereof he the said *A B* hath above thereof complained against him the said *C D*. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

* 527

The like stat-
ing that the
plaintiff made
an assault up-
on a third per-
son. (k)

*[*First plea, general issue, as ante 519.—Second plea, same as the last to the obelisk and then as follows:*]—Because he says, that the said *A B* just before the said time, when, &c. in the said first count mentioned, to wit, on the day and year in that count mentioned, with force and arms, &c. had made an assault upon one *E F* and was then and there, and at the said time, when, &c. beating and ill-treating the said *E F* in breach of the peace of our said lord the king; wherefore the said *C D* at the said time, when, &c. to preserve the peace

(i) See the notes to the precedent, ante, 525. As to this plea, see Com. Dig. Pleader, 3 M. 16. and the precedents, 2 Brown's Ent. 157. 8 Went. Index, 118.

(k) See the note to the last precedent.

of our said lord the king, and to part the said *A B* from, and *To persons.*
to prevent him from further beating and ill-treating the said
E F, gently laid his hands upon the said *A B* as he lawfully
might for the cause aforesaid †, which are the same assaulting,
beating, and ill-treating the said *A B* in the said first count of
the said declaration mentioned, and whereof the said *A B* hath
above thereof complained against him the said *C D*. And
this, &c. [*conclude with a verification, as ante, 422. sixth pre-*
cedent.]

[*First plea, general issue, as ante, 519. Second plea, as to* Correction of
the assaulting, beating, and ill-treating the said A B actio non, an apprentice
by leave, &c. as ante, 526.]—Because he says that before and for disobedience.⁽¹⁾
at the said time, when, &c. in the said first count mentioned,
to wit, at, &c. aforesaid, the said *A B* was the apprentice of
the said *C D* in his trade and business of a ———, and then
and there behaved and conducted himself saucily and contuma-
ciously towards the said *C D*, and then and there refused to
obey his lawful commands relating to his duty as such appren-
tice as aforesaid, whereupon he the said *C D* then and there
moderately corrected him the said *A B* for his said misbe-
haviour, which are the said assaulting, beating and ill-treat-
ing the said *A B* in the said first count mentioned. And this,
&c. [*conclude with a verification, as ante, 422. sixth precedent.*]

* [*First plea, general issue, as ante, 519.—Second plea, as fol-*
lows:]—And for a further plea in this behalf, as to the making
of the said assault on the said *A B* in the said first count of the
said declaration mentioned, and beating, bruising and ill-treating
him, and putting the said iron shackles upon the hands of him
the said *A B*, and imprisoning him for the said space of time in
the said first count mentioned, the said *C D* saith, (*actio non, by*
leave, &c. as ante, 526.) because he saith that he the said *C D*,
before and at the said time, when, &c. in the said first count

* 528

Moderate cor-
rection of a
scaman.^(m)

(1) As to this plea, see Com. Dig. Pleader, 3 M. 19. see the precedents, Brown's Ent. 219. See the necessity for pleading this matter specially, 2 B. & P. 324. see 2 B. & P. 324. It may be frequently advisable to plead the facts more specially, see the precedent, 9 Wentw. 355. and as to pleas of moderate correction in general, see Com. Dig. Pleader, 3 M. 19.

(m) As to the necessity for pleading this ground of defence specially,

To persons.

mentioned, was the master and commander of a certain ship or vessel called the —, and the said *A B* then was a mariner in and belonging to the said ship or vessel, and the said *C D* further saith, that the said *A B* just before the said time, when, &c. in the said first count mentioned, neglected his duty as such mariner as aforesaid, in and on board of the said ship or vessel, and behaved and conducted himself in a mutinous, disorderly, and improper manner, on board thereof, whereupon the said *C D* so being master and commander of the said ship or vessel as aforesaid, for the preservation of discipline and order in and on board thereof; at the said first time, when, &c. did moderately chastise and correct the said *A B* for his said neglect of duty and misconduct, and in so doing did necessarily and unavoidably a little beat, bruise and ill-treat the said *A B*; and for the same purpose he the said *C D* did then and there put the said iron shackles upon the hands of the said *A B*, and did imprison him for the said space of time in the said first count mentioned; as it was lawful for him to do for the cause aforesaid, which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A B* hath above thereof complained, against him the said *C D*. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

* 529

Defence of possession.

That plaintiff was unlawfully in defendant's dwelling-house, and moliter manus imposuit to turn him out.⁽ⁿ⁾

*[*First plea, general issue, as ante, 519. Second, as follows:*] And for a further plea in this behalf, as to the assaulting, beating,^(o) and ill-treating the said *A B* as in the said first count mentioned, the said *C D* (*by leave, &c. actio non, as ante, 421, 422.*) Because he says, that he the said *C D* before and at the said time,

(n) As to this plea, see Com. Dig. Pleading, 3 M. 16, 17. and the precedents, 8 T. R. 299, 78. 9 Wentw. 116.

(o) A wounding cannot be justified merely in defence of possession, (8 T. R. 299. Com. Dig. Pleading, 3 M. 16, 17. 1 Salk. 407. Lutw. 148.) though if the plaintiff attempted to enter the house with force, it is otherwise, see the law and precedents, 8 T. R. 78.

If the plaintiff upon the attempt to remove him, was guilty of an assault upon the defendant or his family, and the defendant did actually beat or wound him in self-defence, then acts may be justified, stating as the 4 in the above precedent, the assault by the plaintiff, and the defendant's self-defence as in the precedent, ante, 525. *Post.* 530.

when, &c. was lawfully possessed^(h) of a certain dwelling-house, with the appurtenances, situate and being at — ; and being so possessed thereof, the said *A B* just before the said time, when, &c. to wit, on the same day and year in the said declaration mentioned, was unlawfully in the said dwelling-house, and with force and arms making a great noise and disturbance therein, and at the said time, when, &c. stayed and continued therein making such noise and disturbance without the leave or license, and against the will of the said *C D*, and during all that time there greatly disturbed and disquieted the said *C D* and his family in the peaceable and quiet possession and enjoyment of his said dwelling-house ; and thereupon the said *C D* then and there requested the said *A B* to cease from making his said noise and disturbance, and to go and depart from and out of the said dwelling-house, which the said *A B* then and there wholly refused to do, whereupon the said *C D*, in defence of the possession of his said dwelling-house, gently laid his hands upon the said *A B* in order to remove, and did then and there remove the said *A B* from and out of the said dwelling-house, as he *lawfully might for the cause aforesaid, ‡ which are the said supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A B* hath complained against the said *C D* ; without this, that he the said *C D* was guilty of the said supposed trespasses, or any or either of them elsewhere than in the said dwelling-house, situate as aforesaid^(q) [*conclude with a verification, as ante, 422. sixth precedent.*]

Defence of possession.

* 530

Because he says, that he the said *C D* long before and at the said time, when, &c. was lawfully possessed of a certain public house, situate at, &c. aforesaid. And the said *A B*, a little before the said time, when, &c. entered and came into the said house of the said *C D*, and then and there made a

The like of a public house.

(h) This is sufficient, 3 Wils. 71. 73. 8 T. R. 78. 299.

(q) As to this averment, see *ante*, vol. 1. Index, tit. *Que est eadem*, &c. 3 Stra. 694. 2 Saund. 5. n. 3. 1 Saund. 82. n. 3. 85. 298. And see the

precedent, Cowp. 162 171. 2 Brown's Ent. 139. When the house is in the same parish or place as that stated in the declaration, this averment is to be omitted.

*Defence of
possession.*

great noise and disturbance therein, and the said *A B* then and there behaved and conducted himself in a rude, quarrelsome and uncivil manner, towards divers persons then and there lawfully being in the said house, and thereby then and there greatly disturbed and disquieted the said *C D* and his family, and the said other persons so being in the said house, in the peaceable and quiet occupation and enjoyment thereof; whereupon the said *C D* then and there requested, &c. [*same as in the last precedent to the end.*]

The like in
resistance of
plaintiff's en-
try into de-
fendant's
dwelling-
house. (r)

[*First plea, general issue, as ante, 519. Second, as follows :*]

And for a further plea in this behalf, as to the assaulting, beating and striking the said plaintiff with a stick, as in the said first count of the said declaration mentioned, the said *C D*, &c. (*by leave, &c. actio non, as ante, 422.*) because he says, that he the said *C D* before and at the said time, when, &c. in the said first count of the said declaration mentioned, was lawfully possessed of and in a certain messuage *or dwelling-house, situate at, &c. in which he the said *C D* did then and there inhabit and dwell, and that he the said *C D* being so possessed thereof, the said *A B* just before the said time, when, &c. to wit, on the same day and year aforesaid, to wit, at, &c. aforesaid, with force and arms, and with a strong hand did attempt and endeavour forcibly to break into and enter the said messuage or dwelling-house of the said *C D*, without the leave or license, and against the will of the said *C D*, whereupon the said *C D*, at the said time, when, &c. being in the said messuage or dwelling-house, in order to preserve the peaceable and quiet possession thereof, did then and there resist and oppose such entrance of the said *A B* into his said messuage or dwelling-house, and in so doing did necessarily and unavoidably assault and beat the said *A B* with the said stick, and as he lawfully might for the cause aforesaid, and so the said *C D* in fact saith, that if any damage or injury then and there happened to the said *A B*, it was occasioned by the said *C D*'s said defence of

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(r) See the precedent, 8 T. R. 78. 529. n. (o), 523 n. (d):
and the notes to the precedent, *ante*,

his said possession of his said messuage or dwelling-house, against the said *A B*, which are, &c. [*conclude as in the precedent, ante, 530. from the ‡, with a verification, as ante, 422.*]

Defence of possession.

[*First plea, general issue, as ante, 519. Second plea, as follows:*] And for a further plea in this behalf to the said assaulting

Defence of possession of a close. (s)

of the said *A B* in the said first count mentioned, and beating and ill-treating him as therein mentioned, the said *C D*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in that case made and provided, saith that the said *A B* ought not to have or maintain his aforesaid action thereof against him, because he says, that he the said *C D*, before and at the said time, when, &c. was lawfully possessed of and in a certain close, to wit, a close called —, in the parish of —, in the county aforesaid, and of a *certain gate of and belonging to the same close, and being so possessed, the said *A B* a little before the said time, when, &c. with force and arms and with a strong hand, and without the license or permission, and against the will of the said *C D*, did force and break open the said gate, and as much as in him the said *A B* lay, did attempt and endeavour forcibly to break into and enter the said close of the said *C D*, and forcibly to drive into the said close a great number, to wit, — sheep, of the said *A B*, and would then and there unlawfully and forcibly with a strong hand have effected and accomplished such unlawful attempt and endeavour, without the license or permission of the said *C D*, and against his will, if the said *C D* had not defended his said possession of his said close and gate, whereupon the said *C D*, being then in his said close, and during the said forcible and wrongful attempt and endeavour of the said *A B*, did at the said time, when, &c. defend his the said *C D*'s possession of his said close and gate, and oppose and resist the said attempt and endeavour of the said *A B*, as it was lawful for him the said *C D* to do on the occasion aforesaid, and in so doing did necessarily and unavoidably assault and beat and ill-treat the

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(s) as to this plea, see 8 T. R. 78. and *ante*, 529. n. (s).

Defence of possession.

said *AB* as in the said first count mentioned; and so the said *CD* saith that if any damage or injury then and there happened to the said *AB*, the same happened of the wrong of the said *AB*, and in the defence by the said *CD* of his said close and gate; without this, that he the said *CD* was guilty of the said several trespasses in this plea mentioned, or any of them, at, &c. aforesaid, or elsewhere, or in any other manner than as in this plea mentioned.^(t) And this, &c. [*conclude with a verification as ante, 422. sixth precedent.*]

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Imprisonment without process.

Plea by two defendants to a declaration for assault and imprisonment that plaintiff committed a breach of the peace in the house of one of them, and that the other defendant as a constable apprehended the plaintiff, and carried him before a justice of the peace.^(u)

[*First plea, general issue, as ante, 519. Second as follows:*] And for a further plea in this behalf as to the assaulting, *beating, and ill-treating of the said *AB*, as in the said first count of the said declaration mentioned, and compelling him to get into the said cart in the said first count mentioned, and to go and travel therein the distance in the said first count mentioned, and as to the imprisoning the said *AB*, and keeping and detaining him in prison for the said time in the said first count mentioned, the said *CD* and *EF*, by leave of the court here for this purpose first had and obtained according to the form of the statute in such case made and provided, say that the said *AB* ought not to have or maintain his aforesaid action thereof against them, because they say that before and at the said time, when, &c. in the said first count mentioned, the said *CD* was lawfully possessed of a certain dwelling-house situate at —, and the said *CD* being so possessed thereof, the said *AB* just before the said time, when, &c. to wit, on, &c. in the said declaration mentioned, at, &c. aforesaid, entered and came into the said dwelling-house, and then and there with force and arms made a great noise, disturbance, and affray therein, and then and there insulted, abused, and ill-treated the said *CD* and his family in the said dwelling-

^(t) As to this averment, see *ante*, in evidence, 7 Jas. I. c. 5. and 21 Jas. I. c. 12. It may however frequently

^(u) As to pleas of this description, see Com. Dig. Pleader, 3 M. 22. and the precedents, 9 Wentw. Index, 103. A peace-officer need not join in the plea, but may plead the general issue, and give the special matter

be advisable for such officer to join in the plea in order to narrow the evidence on the trial, especially when he acted under a warrant, in which case the general replication *de injuria* would be insufficient.

house, and greatly disturbed and disquieted them in the peaceable and quiet possession of the said dwelling-house, in breach of the peace of our said lord the king; whereupon the said *C D* then and there requested the said *A B* to cease his said noise and disturbance, and to depart from and out of the said house, which he the said *A B* then and there wholly refused to do, and *continued in the said house making the said noise, disturbance and affray therein, and then and there threatened the said *C D* and his family, that he would continue making his said noise and disturbance in the said house during the whole night, and hinder and prevent the said *C D* and his family from sleeping or enjoying any quiet or repose in the said house, whereupon the said *C D*, in order to preserve the peace, and restore good order and tranquillity in his said house, then and there gave charge of the said *A B* to the said *E F*, then and there being a constable of the said parish of —, and who then and there saw and had view(x) of the said breach of the peace, so committed by the said *A B* as aforesaid, and then and there requested the said *E F*, so being such constable as aforesaid, to take the said *A B* into his custody, and carry him before some justice or justices of our said lord the king, assigned to keep the peace in and for the said county of —, to answer the premises, and to be dealt with according to law; and the said *E F*, so being such constable as aforesaid, at such request of the said *C D*, then and there gently laid his hands on the said *A B* for the cause aforesaid, and did then and there take the said *A B* into his custody, and did carry and conduct

*Imprisonment
without pro
cess.*

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(x) In a plea justifying an imprisonment by a constable not under a warrant, it seems necessary in general to aver, that the constable had view of the breach of the peace, for it has been decided that a constable cannot arrest for an affray out of his view without a warrant, except felony is likely to ensue, Cro. Eliz. 375. 2 Esp. Rep. 540. 3 Hawk. P. C. 174. 164. book 2. c. 13. s. 8. 2 Hale's P. C. 14. 1 Esp. Rep. 294. There are precedents, however, omitting such statement, 9 Wentw. 27. 344, 345.

And in a late case where a disturbance had been made in a house late at night, and the plaintiff would not go out, but was not guilty of a breach of the peace within the view of the constable, a very able pleader advised a special plea, omitting the above statement, considering that a practice contrary to the above decisions had so long prevailed, and was so necessary for the maintenance of a proper police, that probably a different decision might now take place.

*Imprisonment
without pro-
cess.*

* 535

him the said *A B*, from and out of the said house in order to carry and convey him before such *justice as aforesaid, to be there dealt with according to law for his said offence and breach of the peace, to wit, at, &c. aforesaid; and because it was then and there late at night, and an unreasonable time for the said *E F* to carry the said *A B* before such justice as aforesaid, he the said *E F*, so being such constable as aforesaid, for that reason and for the cause aforesaid, necessarily and unavoidably imprisoned the said *A B*, and kept and detained him in a certain prison in the parish aforesaid, called the —, until the next morning; and the said *C D* and *E F* further say, that on the next morning as soon as conveniently could be, he the said *E F*, so being such constable as aforesaid, endeavoured to carry and convey the said *A B* before such justice as aforesaid, to answer the said premises, and to be dealt with according to law, and because no such justice as aforesaid could be found near to the said prison, and because it was then and there expedient and necessary that the said *A B* should go, proceed and be carried in the said cart before such justice as aforesaid, for the purpose aforesaid, and because the said *A B* then and there refused to get into such cart for the purpose aforesaid, he the said *E F*, so being such constable as aforesaid, and the said *C D*, in his aid and assistance, and at his request, did gently lay their hands upon the said *A B*, and did then and there gently force and compel the said *A B* to get into the said cart, and to go and travel therein the said distance in the said declaration mentioned, in order that he the said *A B* might be carried and conveyed by the said *E F*, so being such constable as aforesaid, before such justice as aforesaid, to answer the premises, and be there dealt with according to law, for his said offence and breach of the peace. And the said *C D* and *E F* further say, that afterwards, and while the said *E F*, so being such constable as aforesaid, was so carrying and conveying the said *A B* before such justice as aforesaid, to wit, on, &c. aforesaid, at, &c. aforesaid, he the said *E F*, at the special solicitation and request of the said *A B*, and upon his making a reasonable and proper submission for the said offence, and with *the consent of the said *A B*, discharged the said *A B* from and out of his said custody, and then and there permitted him to go at large without carrying him before such justice as

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aforesaid,(y) as they the said *C D* and *E F* lawfully might for the cause aforesaid, which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A B* hath above thereof complained against the said *C D* and *E F*,(z) this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

Imprisonment without process.

First plea, general issue, as ante, 519. Second plea, as follows:] And for a further plea in this behalf as to the making the said assault upon the said *A B*, in the said first count of the said declaration mentioned, and imprisoning him and keeping and detaining him in prison for a part of the said time in the said first count mentioned, to wit, for the space of eight hours part of the time in that count mentioned, the said *C D*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in that case made and provided, says, that the said *A B* ought not to have or maintain his aforesaid action thereof against him, because he says, that just before the said time, when, &c. in the said first count mentioned, to wit, on the same day and year aforesaid, at, &c. aforesaid, the said *A B* with force and arms, &c. made an assault upon the said *C D*, and beat and ill-treated him, and thereupon the said *C D*, there and then gave charge of the said *A B*, to a certain peace-officer of our said lord the king, who then and there had view of the said breach of the peace of our said lord the king, so committed by the said *A B* as aforesaid, and requested the said peace-officer to take the said *A B* into his custody, and carry him before some justice or justices of our said lord the *king assigned to keep the peace in and for the said county of —, to answer the premises, and to be examined and dealt with according to law; and the said peace-officer, at such request of the said *C D*, and the said *C D*, in the aid and assistance of the said peace-officer,

The like in a more concise form.(a)

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(y) This statement of defendant's release, is to be according to the fact, *quare* the sufficiency of the statement, 5 East, 294. 3 Hawk. P. C. 174.

(z) It may be necessary in some cases to insert the averment, *ante*, 530. n. (q).

(a) See the notes to the last precedent:

*Imprisonment
under process.*

then and there gently laid their hands upon the said *A B*, in order to take, and did then and there take the said *A B* into the custody of such peace-officer, and kept and detained him so in custody until the said *A B* afterwards, and as soon as conveniently could be, was carried before one of his majesty's justices assigned to keep the peace in and for the said county of —, for examination concerning the premises, and to be dealt with according to law, and on that occasion the said *A B* was necessarily and unavoidably imprisoned, and kept and detained in prison for the said space of time in the introductory part of this plea mentioned, as he lawfully might for the cause aforesaid; which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A B* hath above thereof complained against him the said *C D*. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

Justification
of an arrest,
&c. by a sher-
riff's officer
and another
in his assist-
ance, under a
latitat against
plaintiff. (b)

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[*First plea, general issue, as ante, 519. Second plea, as follows:*] And for a further plea in this behalf as to the making the said assault in the said first count mentioned, and with a little force and violence pushing, forcing, and thrusting(c) the said *A B* from and out of the said messuage or dwelling-house in the said first count of the said declaration mentioned, into the said street therein also mentioned, and whilst the said *A B*

(b) See the precedents, 3 Lev. 61. 1 Saund. 296. 298. n. 5. 1 Rich. C. P. 151. 9 Wentw. Index, 98 to 104. 109. As to the mode of pleading, see 1 Saund. 296. n. 1. 298. n. 1. Com. Dig. Pleader, 3 M. 24. *Ante*, vol. 1. Index, tit. *Process*; as to the statement of different process, see *ante*, 162 to 168. How to plead in an inferior court, Cowp. 18. 2 T. R. 172. Com. Dig. Pleader, 3 M. 24. Justification under a *latitat*, executed in *London* by a serjeant at mace, 9 Wentw. 331. If the arrest were under a bill of *Middlesex*, or a special *capias* by original, or a *capias* in C. P. describe the process as *ante*, 162 to 168. If there be any doubt as to the regulari-

ty in issuing the writ, the officer should justify separately, and if the officer have been guilty of any excess, the plaintiff in the original action should also plead separately, 2 Stra. 1184. 1 Salk. 408, 409.

(c) The recital of the trespasses intended to be justified, must depend on the facts of each particular case. When the plea justifies a wounding and actual beating, or more than a *molliter manus impositus* to make the arrest, the particular resistance or occasion of such wounding, &c. must be stated in the subsequent part of the plea, as in this precedent, see *ante*, 529. n. (o), and 1 Saund. 296. n. 1.

continued on the ground in the said street, pulling, haling, and dragging him upon his back through the mud and dirt, in and along the said street, and for the distance and length of way in the said first count also mentioned, and thereby a little hurting, bruising, and wounding the said *A B*; and as to the imprisoning the said *A B*, and keeping and detaining him in prison for the said space of time in the said first count mentioned, and as to the rending, tearing, damaging, and spoiling the clothes and wearing apparel of the said *A B* in the said second count mentioned, by the said *C D* and *E F* above supposed to have been done, the said *C D* and *E F*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, say that the said *A B* ought to have or maintain his aforesaid action thereof against them, because they say that before the said time, when, &c. in the said first and second counts mentioned, to wit, on, &c. a certain writ of our lord the now king, commonly called a *latitat*, was issued(*d*) out of the court of our said lord the king, before the king himself, the said court then and still being holden at *Westminster*, in the county of *Middlesex*,(*e*) directed to the then sheriff of —, by which said writ our said lord the king commanded the said sheriff that he should take the said *A B*, if he should be found in his bailiwick, and keep him safely, so that he might have his body before our said lord the king at *Westminster* aforesaid, on — next, after —, to answer to the said *E F* in a plea of trespass, and also to a bill of the said *E F* against the said *A B*, for —. upon promises, according to the custom of the said court of our said lord the king, before the king himself to be exhibited, and that the said sheriff should have there then that writ; which said writ was then and there duly indorsed for bail for —. by virtue of an affidavit of the cause

*Imprisonment
under process.*

*Issuing of the
latitat.*

* 539

*Indorsed for
bail.(f)*

(*d*) See 3 Lev. 63. if the plaintiff is usual to refer to the affidavit to in the original action justify alone, hold to bail, 1 Saund. 296. n. 2. 3 T. R. 183. But it is unnecessary to state the particulars of the cause of action to be issued, &c.

(*e*) As to this allegation, *ante*, even in a justification by the plaintiff 162. n. (i). 1 Saund. 300. b. n. 7. in the original action, and though

(*f*) See *ante*, 163. the indorsement for bail should be stated, and it under process of an inferior court, 3 T. R. 183. *Cowp.* 18.

*Imprisonment
under process.*

*Delivery of
writ to the
sheriff.*

*Warrant to
one of the de-
fendants. (g)*

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*Delivery of
warrant to
bailiff.*

*Arrest by one
of the defend-
ants as bailiff,
and by the
other in his
aid.*

of action of the said *E F*, in that behalf before then duly made and affiled of record in the said court of our said lord the king, before the king himself, at *Westminster* aforesaid, according to the form of the statute in such case made and provided; and which said writ so indorsed for bail as aforesaid, afterwards, and before the return thereof, and also before the said time, when, &c. to wit, on, &c. at, &c. aforesaid, was delivered to *G H*, Esquire, who then and from thenceforth until, and at, and after the return of the said writ, was sheriff of the said county of —, to be executed in due form of law; and thereupon the said *G H*, so being sheriff as aforesaid, afterwards, and before the return of the said writ, and before the said time, when, &c. in the said first and second counts mentioned, to wit, on the same day and year last aforesaid, at, &c. aforesaid, made his certain warrant in writing, under his hand and seal of office of sheriff aforesaid, directed to the keeper of the gaol of the said county of —, and to the said *C D*, the said sheriff's bailiff, and thereby commanded him the said *C D*, that he should take the said *A B*, if he should be found in his bailiwick, and safely keep him so that the said sheriff might have the body of the said *A B* *before our said lord the king at *Westminster* aforesaid, on — next, after —, to answer the said *E F* in the plea, and to the bill in the said writ mentioned; which said warrant, afterwards, and before the return of the said writ, and before the said time, when, &c. in the said first and second counts mentioned, to wit, on the day and year last aforesaid, at, &c. aforesaid, was delivered to the said *C D*, to be executed in due form of law. By virtue of which said writ and warrant, the said *C D*, as such bailiff as aforesaid, and the said *E F*, as his servant and by his command, afterwards, and before the time appointed for the return of the said writ, to wit, at the said time, when, &c. in the said first and

(g) Examine with the warrant. der seal, 2 Saund. 305. n. 13. and see See the precedent 3 Lev. 63. and the mode of pleading a warrant, 1 Saund. 298. n. 5. It is not necessary in this case to state that the warrant was un- the precedent, 1 Saund. 296. When it is necessary, see Com. Dig. Pleader, 3 M. 24.

second counts mentioned, and within the bailiwick of the said sheriff, to wit, at, &c. aforesaid, took and arrested the said *A B* by his body in the said messuage or dwelling-house in the said first count mentioned, and kept and detained him in the custody of the said *C D*, at the suit of the said *E F*, for the cause aforesaid, for the said space of time in the said first count mentioned, as it was lawful for them to do for the cause aforesaid.^(h) And because at the said time, when, &c. in the said first and second counts mentioned, the said *A B* having been so arrested as aforesaid, it was necessary and expedient, in order to keep him in safe custody, under and by virtue of the said writ and warrant, and to prevent him from escaping out of such custody, that the said *A B* should be taken by and in the custody of the said *C D*, out of the said messuage or dwelling-house, in the said first count mentioned, (the same not being a place where the said *A B* could be kept in safe custody by the said *C D*, in pursuance of the said writ and warrant,) to some place in the said bailiwick, where he might be kept in the safe custody of the said *C D*, under and by virtue of the said writ and warrant, and because the said *A B*, being then and there requested by the said *C D*, peaceably and quietly to go out of the said messuage or dwelling-house with the said *C D* for the purpose aforesaid, would not peaceably or quietly go with nor could otherwise be taken by the said *C D* from and out of the said messuage or dwelling-house to such place, for the purpose of being kept in safe custody as aforesaid, the said *C D* as such bailiff as aforesaid, and the said *E F* as his servant, and by his command before the time appointed for the return of the said writ, to wit, at the said time, when, &c. in the said first count mentioned, within the bailiwick of the said sheriff, were forced and obliged to, and did then and there necessarily and unavoidably, in order to keep the said *A B* in safe custody, under and by virtue of the said writ and warrant, and to prevent him from escaping out of the custody of the said *C D*,

*Imprisonment
under process.*

*Necessity to
remove plain-
tiff to a place
of safe custo-
dy, and his
resistance.^(h)*

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(h) Where only an arrest is justified, the plea ends here with a verification, see the precedent, 3 Lev. 63: but if a wounding or actual battery be justified, the occasion thereof must be stated as in the above precedent, *ante*, 529. n. (o), and 1 Saund. 296. n. 1.

*Imprisonment
under process.*

*Plaintiff's at-
tempt to es-
cape.*

so being such bailiff as aforesaid, with a little force and violence, push, force, and thrust the said *A B* from and out of the said messuage or dwelling-house in the said first count mentioned, into the said street there; and because the said *A B* at the said times, when, &c. in the said first and second counts mentioned, being down on the ground in the said street, wholly refused peaceably or quietly to go with, nor could be otherwise taken by the said *C D* to a place wherein he might be kept in safe custody, under and by virtue of the said writ and warrant, and being so in custody as aforesaid, attempted to escape from and out of the same custody, the said *C D* and *E F*, for the purpose of taking him to some place of safe custody as aforesaid, and to prevent him from escaping out of the custody of the said *C D*, were forced and obliged to pull, haul, and drag the said *A B* upon his back through the mud and dirt, in and along the said street there, for the distance and length of way in the said first count mentioned, and in so doing, unavoidably a little hurt, bruised, and wounded the said *A B*, and a little rent, tore, damaged and spoiled the said clothes and wearing apparel of the said *A B*, in the said second count mentioned, the said *C D* and *E F* doing as little damage to the said *A B* and his said clothes and wearing apparel, as they possibly could on those occasions; which are the *said supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A B* hath above complained against them the said *C D* and *E F*†(i) And this, &c. [conclude with a verification, as ante, 422. sixth precedent.]

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*The like by the
sheriff or offi-
cer to whom
the writ is di-
rected. (k)*

[Same as the last precedent as far as the obelisk, omitting the statement of the warrant, and alleging that the sheriff himself made the arrest, and state the return of the writ as follows:]

(i) If the defendants justify an arrest at another place or time than that mentioned in the declaration, there may be occasion here for a traverse, as ante, 530. and see the precedent, 3 Lev. 63.

(k) See the precedent, Latw. 936. If the sheriff, or the officer to whom *meane* process is directed, justify im-

prisonment by force of such process, he must shew the writ to be returned, but the bailiff who has a warrant from the sheriff or any person who acts in his aid need not, 1 Salk. 409. 12 Mod. 396. Com. Dig. Pleader, 5 M. 24. 6 T. R. 235. Ante, vol. 1. Index, tit. *Process*.

And the said *C D* further saith, that afterwards, and at the return of the said writ, to wit, on the said — next after —, he the said *C D* duly returned the said writ to the said court of our said lord the king, before the king himself, at *Westminster* aforesaid, and then and there returned thereon, that by virtue thereof, he the said *C D* had taken the said *A B*, whose body he had ready, as by the said writ he was commanded; as by the said writ, and the said return thereof remaining of record in the said court of our said lord the king, before the king himself here, to wit, at *Westminster* aforesaid, more fully appears. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

Imprisonment under process.

[*First plea, general issue, as ante, 519. second plea, as follows:*] And for a further plea in this behalf, as to the said assaulting the said *A B*, in the said first count of the said declaration mentioned, and imprisoning him and *keeping and detaining him in prison for the said time in the said first count mentioned, above supposed to have been done by the said *C D*, he the said *C D* by leave, &c. (*actio non, as ante, 421, 422.*) Because he says that one *E F* before the said time, when, &c. to wit, in — term, in the — year of the reign, &c. (*state the recovery of the judgment in debt or assumpsit, and the reference to the record, as in the precedents, ante, 147 to 150. and then proceed as follows:*) And the said *C D* in fact further saith, that he the said *C D* before and at the said time, when, &c. was, and from thenceforth hath been, and still is, one of the attorneys of the said court of our said lord the king, before the king himself, (*or if in C. P. "of the bench aforesaid,"*) and that being such attorney, and the said judgment, so recovered by the said *E F* as aforesaid, being in full force, and the damages therein mentioned, and so adjudged to the said *E F* as aforesaid, unpaid and unsatisfied he the said *C D* before the

Justification by attorney, under a capias ad satisfaciendum. (1)

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Recovery of the judgment.

Defendant as attorney issued ca. sa.

(1) See the precedents, 9 Wentw. 351. and Index, 106. &c. Com. Dig. Pleading, 3 M. 24. In a justification under a *ca. sa.* by the plaintiff in the former suit or his attorney he must state the judgment as well as the execution, 1 Salk. 409. and the officer should not join with him if there be any doubt as to the regularity of the judgment, 2 Stra. 1184.

*Imprisonment
under process.*

said time, when, &c. to wit, on the — day of —, in the — year aforesaid, as the lawful attorney of and for the said *E F*, in that behalf, and by virtue of his retainer in that behalf caused to be issued out of the said court of our said lord the king, before the king himself, (or if in *C. P.* "of the bench aforesaid,") at *Westminster* aforesaid, upon the said judgment, a certain writ of our said lord the king, called a *capias ad satisfaciendum* against the said *A B*, directed to the sheriffs of *London*, by which said writ, our said lord the king commanded, &c. (here state the *ca. sa. as ante*, 148. and then proceed as follows :)

Delivery of writ by defendant to sheriff of *London*.

which said writ he the said *C D* as such attorney for the said *E F* as aforesaid, and as he lawfully might, afterwards, and before the return thereof, and also before the said time, when, &c. to wit, on the — day of —, *A. D.* —, at, &c. aforesaid, delivered to one —, esq. and —, esq. who then and from thenceforth, until, and at, and after the said time, when, &c. were sheriffs of *London*, to be executed in due form of law ;(m) *by virtue of which said writ, the said sheriffs of *London*, afterwards, and before the return of the said writ, to wit, on the day and year in the said declaration mentioned, being the said time, when, &c. and within their bailiwick as such sheriffs, that is to say, at *London* aforesaid, in the parish and ward aforesaid, took and arrested the said *A B* by his body, and kept and detained him in their custody, under and by virtue of the said writ, and for the cause therein specified, for the said time in the said declaration mentioned, as they lawfully might, which is the said supposed trespass in the introductory part of this plea mentioned, and whereof the said *A B* hath above complained against him the said *C D*. And this, &c. [conclude with a verification, as ante, 422. sixth precedent.]

* 544

The caption.

The like by a sheriff's officer under a writ of *ca. sa.*(n)

[First plea, general issue, as ante, 519. Second plea, as follows :]
And for a further plea in this behalf, as to the said assaulting

(m) In another precedent, the sheriff's warrant was stated, 9 Wentw. 351. If the sheriff or his officer plead separately, he need not state the judgment, *id. ibid.*

(n) See the notes to the last precedent, *id. ibid.*

the said *A B* in the said first count of the said declaration mentioned, and imprisoning him, and keeping and detaining him in prison for the said time in the said first count in the said declaration mentioned, and above supposed to have been done by the said *C D*, he the said *C D*, by leave, &c. (*actio non, as ante*, 421.) because he says, that one *E F*, before the said time, when, &c. to wit, in — term, in the — year of the reign of our said lord the now king, sued and prosecuted out of the said court of our said lord the king, before the king himself, (or if in *C. P.* "out of the court of our said lord the king of the bench,") (the said court then and still being held at *Westminster*, in the county of *Middlesex*.) a certain writ of our said lord the now king, called a *capias ad satisfaciendum*, against the said *A B*, directed to the sheriff of —, by which said writ our said lord the king commanded the said sheriff that he should "take the said *A B*, if he should be found in his bailiwick, and him safely keep, so that he might have his body before our said lord the king, (or if in *C. P.* "before his majesty's justices of the bench,") at *Westminster*, on — next after —, then next and now last past, to satisfy the said *E F* for —, which in the said court of our said lord the now king, before the king himself, (or if in *C. P.* "before his majesty's justices of the bench aforesaid,") at *Westminster* aforesaid, were awarded to the said *E F* for his damages, which he had sustained as well by reason of the not performing certain promises and undertakings made by the said *A B* to the said *E F*, as for his costs and charges, whereof the said *A B* was convicted, and that the said sheriff should have there that writ; which said writ was afterwards, and before the return thereof, and also before the said time, when, &c. to wit, on the — day of —, *A. D.* —, at, &c. aforesaid, delivered to one —, esq. who then and from thenceforth, until, and at, and after the said time, when, &c. was sheriff of — aforesaid, to be executed in due form of law: whereupon he the said —, so being such sheriff of — as aforesaid, afterwards and before the return of the said writ, and also before the said time, when, &c. to wit, on, &c. last aforesaid, at, &c. aforesaid, for having execution of the said writ, made his warrant in writing, sealed with the seal of his said office of sheriff of — aforesaid, and then and there directed the same to the said *C D*, who then and there, and until,

*Imprisonment
under process.*

* 545

*Warrant to
defendant.*

*Imprisonment
under process.*

and at, and after the said time, when, &c. was bailiff of the said sheriff of —, and by the said warrant commanded him that he should take the said *A B*, if he should be found within the said sheriff's bailiwick, and him safely keep, so that he the said sheriff might have his body before our said lord the king, (*or if in C. P. "before his majesty's justices of the bench,"*) at Westminster, on the said — next after —, to satisfy the said *E F* for his damages aforesaid, by him in form aforesaid recovered, according to the exigency of the said writ; which said warrant afterwards, and before the return of the said writ, and also before the said time, when, &c. to wit, on, &c. last aforesaid, at, &c. aforesaid, was delivered to the said *C D* to be executed in due form of law; by virtue of which said warrant the said *C D*, as such sheriff's officer as aforesaid, afterwards, and before the return of the said writ, to wit, on the same day and year in the said declaration mentioned, being the said time, when, &c. within the bailiwick of the said then sheriff of — aforesaid, that is to say, at, &c. aforesaid, in execution of the said warrant, gently laid his hands upon the said *A B*, to take and arrest him by virtue of the said writ and warrant, and did then and there arrest and take him into custody by virtue of the said writ and warrant, and kept and detained him in custody by virtue of the said writ and warrant, and for the cause therein mentioned, and in the said writ specified for the said time in the said declaration mentioned, as he lawfully might for the cause aforesaid; which are the said supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A B* hath above thereof complained against him. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

* 546

Caption under the warrant.

*To personal property.
Justification of taking and impounding cattle as a distress damage-feasant.
(o)*

C D }
ats. } [*First plea, general issue, as ante, 519. Second plea, as A B.*] follows: And for a further plea in this behalf, as to

(o) See the precedents, 9 Wentw. Index, 71, 72, 76, 78. and the law, Com. Dig. Pleader, 3 M. 26. In *replevin* we have seen that it is necessary in the plea to set forth the defendant's title, but in *trespass* it is sufficient to state that the defendant was "*lawfully possessed,*" *ante*, 516. notes (g) and (r). 1 Saund. 221. n. 1. 1 East, 212. If the defendant justify as servant of another, state in the commencement of the plea, that one

the seizing and taking the said cattle of the said *A B*, in the said first count of the said declaration mentioned, and leading and driving away the same, and impounding and keeping the same for the space of —, part of the said time in the said first count mentioned, and until the said *A B* was forced and obliged to pay the said sum of —*l.* in the said first count mentioned, to have the same released and restored to him the said *A B*, as in the said first count mentioned, the said *C D* by leave, &c. (and *actio non*, as ante, 421. *third precedent*.) Because he says that the said *C D*, before and at the said time, when, &c. was lawfully possessed of a certain close, or piece or parcel of land with the appurtenances, called —, situate and being in the parish aforesaid, in the county aforesaid; (p) and because the said cattle in the said first count mentioned, before and at the said time, when, &c. in the said first count mentioned, were wrongfully in the said close, or piece or parcel of land of him the said *C D*, in which, &c. eating and depasturing the grass and herbage of the said *C D* there then growing, and doing damage there to the said *C D*, he the said *C D* at the said time, when, &c. seized and took the said cattle in the said declaration mentioned, in the said close, piece or parcel of land of the said *C D*, so doing damage therein as aforesaid, as a distress for the said damage, and led and drove away the same out of the same close, in which, &c. to a certain common pound in the parish aforesaid, and there impounded the same, and kept the same so impounded for the said space of time in the introductory part of this plea mentioned, and until the said *A B* paid to him the said *C D*, the said sum of —*l.* in the said first count mentioned to have the same released and restored to him the said *A B*, as and for and the same then and there being a reasonable satisfaction for the said damage so done by the said cattle as aforesaid, as it was lawful for him the said *C D* to do for the cause aforesaid; which are the same

Distress, damage-feasant.

* 547

E F was possessed, &c. and in stating the distress, say that he the said *C D*, as the servant of the said *E F*, and by his command at the said time, when, &c. seized, &c. see 1 Saund. 221.

(p) This is necessary, 6 Mod. 117. And if the parish or place be different to that stated in the declaration, the plea should conclude with a traverse, see ante, vol. 1. Index, tit. *Traverse*.

Removal of
goods, du-
mage-feasants.

* 548

supposed trespasses. in the introductory part of this plea mentioned, and whereof the said *A B* hath above thereof *complained against him the said *C D*. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

Justification
of the remov-
al of goods to
a small dis-
tance the
same being
incumbering
plaintiff's
close.(g)

[*First plea, general issue, as ante, 519. Second plea, as follows :*] And for a further plea in this behalf as to the seizing, taking, removing, and carrying away the said goods and chattels in the said last count mentioned, the said *C D* by leave, &c. (*actio non, &c. as ante, 421. third precedent.*) because he saith, that before and at the said time, when, &c. he the said *C D* was lawfully possessed of a certain close, or piece or parcel of land, called —, situate at, &c. and because the said goods and chattels in the said last count mentioned, before and at the said time, when, &c. in the said last count mentioned, were wrongfully in and upon the said close or piece or parcel of land, incumbering the same, and doing damage there to the said *C D*, he the said *C D*, at the said time, when, &c. in the said last count mentioned, seized and took the said goods and chattels in the said last count mentioned, in the said close, piece or parcel of land, so incumbering the same as aforesaid, and removed and carried away the same to a small and convenient distance, to wit, in the parish aforesaid, and there left the same for the use of the said *A B*, doing no unnecessary damage to the said goods and chattels, on the occasion aforesaid, and as he lawfully might for the cause aforesaid; which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A B* hath above thereof complained against him the said *C D*. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

Justification
of taking coals
under a pre-
scriptive right
to port duties.
(r)

[*First plea, general issue, as ante, 519. Second plea, as follows :*] And for a further plea in this behalf, as to the seizing

(g) See the notes to the last precedent.

(r) See the precedents, 9 Wentw. Index, 73. 82. 8 Wentw. 124. 3 Burr. 1402. Lutw. 1519. 2 Wils. 95. Ld. Raym. 384. Another plea

was added stating the prescription to be "to take a reasonable distress," and another that the port duty was payable by persons *not being legally exempted* from the payment.

and taking the said coals in the said first count of the said declaration mentioned, and keeping and detaining the same from the said *A B* for a certain space of time, to wit, for the space of —, part of the said time in the said first count mentioned, and also as to the seizing, taking, and carrying away the said coals in the said last count mentioned, and converting and disposing thereof as therein mentioned, the said *C D*, by leave, &c. says, (*actio non, as ante*, 421. *third precedent*;) because he says, that long before and at the said time, when, &c. one *E F* was and still is seised in his demesne as of fee, of and in a certain ancient port, gout or haven, called —, in the river —, in the county of —, and that he the said *E F*, and all those whose estate he now hath, and at the said times when, &c. had in the said port, gout or haven, for the time being, from time whereof the memory of man is not to the contrary, have repaired and maintained, and have been used and accustomed to repair and maintain, and of right ought to repair and maintain, the said port, gout or haven, when and as often as it should be necessary, at his and their own proper costs and charges, for the use and benefit of all persons importing and exporting goods into or out of the said port, gout or haven, for the benefit and advantage of trade and navigation there; and that he the said *E F*, and all those whose estate he now hath, and at the said times when, &c. had, of and in the said port, gout or haven, with the appurtenances, from time whereof the memory of man is not to the contrary, have had, received, and taken, and have been used and accustomed to have, and receive, and take, and of right ought to have had, and received, and taken, and still of right ought to have, receive, and take, of and from every ship or vessel arriving in the said port, gout, or haven, with upwards of ten chaldrons of coals on board thereof, and unlading the same coals there, a certain reasonable toll or duty, that is to say, four bags of coals, containing respectively divers, to wit, two bushels, and when and as often as the said toll or duty hath been and remained unpaid after reasonable request and demand thereof made, the owners and proprietors of the said port, gout or haven, for the time being, from time to time, from time whereof the memory of man is not to the contrary, have used and have been accustomed to

Seizure for
port duties.
* 549

E F seised of
a port

His obligation
to repair.

Prescriptive
right to port
duties.

* 550

And to seize
for the same...

*Seizure for
port duties.*

*Plaintiff in-
debted in tolls.*

*Seizure by de-
fendant as ser-
vant of E F.*

seize and take the said toll or duty, and to carry away the same, and to convert and dispose thereof to his and their own use; and the said *C D* further says, that before either of the said times when, &c. a certain ship or vessel of the said *A B*, with a greater quantity than ten chaldrons of coals, to wit, twenty chaldrons of coals on board thereof, arrived in the said port, gout or haven, to wit, at, &c. aforesaid, and did there before either of the said times when, &c. unlade the said last-mentioned quantity of coals, by reason whereof a certain toll or duty, to wit, — bags of coals, containing respectively divers, to wit, two bushels, became and was due and payable from the said *A B* to the said *E F*. Whereupon the said *C D* just before the said first time, when, &c. to wit, on the day and year in the said declaration mentioned, as the servant of the said *E F*, and by his command in the said port, gout or haven, demanded of and from the said *A B*, the said toll or duty for the said coals, for and on account of the said *E F*, whereupon the said *A B* then and there refused to pay or deliver the same, and thereupon the said *C D* at the said times, when, &c. in the said port, gout or haven, as such servant of the said *E F*, and by his command, seized, took and carried away the said — bushels of coals in the said last count mentioned, as and for such toll or duty so due and payable as aforesaid, the same being part of the said coals so brought into the said port, gout or haven as aforesaid, and kept and detained the same for the said space of time in the said first count mentioned, and in so doing, and in separating, and dividing, and measuring the same, from the said coals so brought into the said port, gout or haven as aforesaid, did necessarily and unavoidably seize *and take, and keep and detain the residue of the said coals, whereof the said coals in the said first count mentioned were part and parcel, for the said space of time in the introductory part of this plea mentioned, the same being a reasonable time for that purpose, doing no unnecessary damage to the said *A B* on the occasion aforesaid, as it was lawful for him to do for the cause aforesaid; which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A B* hath above thereof complained against him; without this, that he the said *C D* is guilty of the said seizing, taking and keeping, and detaining the said coals in the said first count mentioned, or of seizing,

taking or carrying away the said coals in the said last count mentioned, at, &c. aforesaid, or elsewhere out of the said port, gout or haven, in the river —, aforesaid. And this, &c. [conclude with a verification, as ante, 422. sixth precedent.]

Liberum tenementum.

[First plea, general issue, as ante, 519. Second plea, as follows:]

To real property.

And for a further plea in this behalf, as to the *breaking and entering the said close, in which, &c. in the said first count of the said declaration mentioned, and with feet in walking, treading down, trampling upon, consuming and spoiling the grass and herbage there then growing, and tearing up, forcing up, and removing the faggots in that count mentioned, and scraping up and collecting together the loose earth, soil, manure and compost, in the said first count mentioned, and beating down, throwing down, prostrating and destroying part of the banks and mounds in that count also mentioned, and casting and throwing the said loose earth, soil, manure, and compost so scraped up and collected, and the earth and soil arising from the said banks and mounds so prostrated and destroyed, as in the same count mentioned, from and out of the said close; the said *C D*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said *A B* ought not to

Liberum tenementum, enumerating the trespasses. (s)

* 552

Enumeration of the trespasses.

Action non, &c.

(s) As to the plea of *Liberum Tenementum* in general, see vol. 1. Index, tit. *Liberum Tenementum*, and 1 Saund. 299. b. n. 6. Com. Dig. Pleader, 3 M. 34. Willes, 218. A right of possession as a freeholder or leaseholder, &c. may be given in evidence under the general issue not guilty, see 8 T. R. 403. and in that case the defendant was under the general issue permitted to give in evidence the pulling down a wall, but in 8 East, 404. the court held that the defendant could not justify under the general issue, the cutting the posts and rails of another, though put upon the defendant's own soil; it is therefore frequently necessary to plead *liberum tenementum* specially, and to justify the cutting or removal of rails,

&c. specially, as incumbering the plaintiff's land. This plea may also be advisable, in order to compel the plaintiff to new assign where he has not set forth the abutments, or name of the close in his declaration, 1 Saund. 299. b. c. or to narrow the evidence as to the title of the parties. Where there is a second count for removing or carrying away goods only, it may be advisable in a distinct plea to state "that the defendant was lawfully possessed of a certain close, and that he took the goods incumbering the same, and moved them to a convenient distance, and there left them for the use of the plaintiff," as in the precedent, ante, 548. see 6 Mod. 7 Willes, 222. n. b.

Liberum tenementum.

Locus in quo, freehold of E F.

Defendant's entry, &c. as his servant.

have or maintain his aforesaid action thereof against him, † because he says that the said close in the said first count mentioned, and in which, &c. now is and at the said several times, when, &c. was the close, soil, and freehold of one *E F*, to wit, at, &c. aforesaid, wherefore the said *C D*, as the servant of the said *E F*, and by his command, at the said times when, &c. in the said first count of the said declaration mentioned, broke and entered the said close in which, &c. in the said first count mentioned, and with his feet ‡ in walking, trod down, trampled upon, consumed and spoiled the said grass and herbage therein also mentioned, and because the said faggots, earth, soil, manure, and compost in the said first count mentioned, and the said part of the said banks and mounds in the said first count mentioned, before the said times when, &c. had been wrongfully and injuriously put and placed, and were at those times remaining and being in and upon the said close, in which, &c. and incumbering the same, he the said *C D* at the said times when, &c. as such servant, and by such command as aforesaid, in order to remove *the said incumbrances, tore up, forced up and removed the said faggots, and scraped up and collected together the said loose earth, soil, manure and compost, and beat down, threw down, prostrated and destroyed the said part of the said banks and mounds in the said first count mentioned, and cast and threw the said loose earth, soil, manure and compost so scraped up and collected, and the said earth and soil arising from the said banks and mounds so prostrated and destroyed, as in the same count mentioned, from and out of the said close, doing no unnecessary damage to the said *A B* on the occasion aforesaid; which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A B* hath above complained against him the said *C D*. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

* 553

The like in a more concise form. (f)

C D & *G. H* }
ats.
A B.

[*First plea, not guilty, as ante, 519.*] And for a further plea in this behalf, the said *C D* and

(f) See the notes to the last precedent.

G H by leave, &c. say, (*actio non, as ante, 421. third precedent:* *Liberum tenementum.*) *If the trespasses in the declaration, relate entirely to land or realty, and not to any personal property, there is no occasion for any recital but otherwise it is necessary to qualify the plea in its commencement, by reciting the trespasses to the land, as in the last precedent.*) because they say, that the said close in the said declaration mentioned, and in which, &c. now is, and at the said several times when, &c. was the close, soil and freehold of the said *C D*, to wit, at, &c. aforesaid, wherefore the said *C D* in his own right and the said *G H* as his servant and by his command, at the said several times, when, &c. committed the said several supposed trespasses in the said declaration mentioned, (or "*in the introductory part of this plea mentioned,*") in the said close, in which, &c. so being the close, soil and freehold of the said *C D*, as they lawfully might for the *cause aforesaid, which are the said several supposed trespasses, whereof the said *A B* hath above thereof complained against them. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

* 554

[*First plea, general issue, as ante, 519. Second plea, same as ante, 551, 552, to the obelisk, stating the trespasses intended to be justified, as in the declaration, and then proceed as follows:*] *Seisin in fee by a copyholder. (u)*

Because he says, that the said close, in which, &c. in the said first count mentioned, now is and at the said several times when, &c. in the said first count mentioned, was and from time immemorial hath been within and parcel of the manor of —, in the county of —, and a customary tenement of that manor demised and demisable by copy of the court rolls of the said manor, by the lord of the said manor, or by his steward of the court of the said manor for the time being, to any person or persons willing to take the same in fee-simple or otherwise, at the will of the lord of the said manor, according to the custom of the said manor; And the said *C D* further says, that

(u) As to the mode of pleading a holder as in this precedent, may copyhold title in general, see *ante*, 205, 206, 207, 209, 229 to 231. If by the lessee of a copyholder, the plea after stating the seisin of the copy- state the demise as in the precedents, *post*, 555, 556. and a licence by the lord to demise, need not be stated, *Bac. Abr. tit. Leases, l. 6.*

Seisin of a copyholder.

long before either of the said times, when, &c. in the said first count mentioned, to wit, on the — day of —, *A. D.* —, *E F* Esquire, then being lord of the said manor at his court baron then holden in and for the said manor, before *G H* —, then his steward of the court of the said manor, by copy of the court rolls of the said manor, granted to the said *C D*, amongst other things, the said close, in which, &c. to hold the same to the said *C D*, his heirs and assigns for ever, by copy of the court roll of the said manor, at the will of the lord of the said manor, according to the custom of the said manor; by virtue of which said grant, the said *C D* afterwards and before any of the said times, when, &c. to wit, on the day and year last aforesaid, entered into the said close, in which, &c. and became and was seised thereof, in his demesne as of fee at the will of the lord *of the said manor, according to custom of the said manor, and continued so seised thereof until and at and after the said several times, when, &c. Wherefore the said *C D* at the said times, when, &c. in the said first count mentioned, broke and entered the said close, in which, &c. and with his feet, &c. [*conclude as in the precedent, ante, 552. from the ‡.*]

* 555

Justification by a tenant under a lease for years giving express colour to the plaintiff. (x)

[*First plea, general issue, as ante, 519. Second plea, the same as the precedent, ante, 551, 552. to the obelisk, stating the trespasses intended to be justified as in the declaration, and then proceed as follows:*] Because he saith, that one *E F*, before any of the said times, when, &c. to wit, on, &c. at the parish aforesaid, in the county aforesaid, was seised in his demesne as of fee, of and in the said close in the said declaration mentioned, and in which, &c. with the appurtenances; and being so thereof seised afterwards, and before any of the said times, when, &c. in the said declaration mentioned, to wit, on the day and year last aforesaid, at the parish aforesaid, by a certain indenture

(x) As to this plea, see Com. Dig. Pleader, 3 M. 40, 41. and *ante*, vol. 1. Index, tit. *Colour*. Though the right of possession may be given in evidence under the general issue, 8 T. R. 403. It is frequently advisable to plead this plea, in order to compel

the plaintiff to set forth his own title, or to admit some part of the defendant's, and where the plaintiff in trespass *quare claustrum fregit*, states also the removal of personal property, or cutting down posts and rails, &c. this plea is necessary, 8 East, 404.

then and there made between the said *E F* of the one part, and the said *C D* of the other part, which said, &c. (*here state the profert of the lease, and the demise and reference to the indenture, and the defendant's entry, as ante, 215. and then proceed as follows :*) And the said *C D* being so possessed, the said *A B* claiming title to the said close, in which, &c. with the appurtenances, under colour of a certain charter of demise, pretended to be thereof made to him by the said *E F*, for the term of his natural life, before the making of the said demise by the said *E F* to the said *C D* as aforesaid, whereas nothing of or in the said close, in which, &c. or any part thereof, ever passed by virtue of that charter, afterwards and before any of the said times, *when, &c. and during the continuance of the said term so demised to the said *C D* as aforesaid, to wit, on the said first day in the said first count mentioned, entered into and upon the said close, in which, &c. with the appurtenances, and was thereof possessed, and thereupon the said *C D* at the said several times, when, &c. entered into and upon the said close in the said declaration mentioned, and in which, &c. in and upon the said *A B*'s possession thereof, as being the close of him the said *C D*, and with his feet, &c. [*Same as the precedent, ante, 552, from the † to the end, justifying the trespasses according to the fact.*]

Possession of
lessee.

Colour given.

* 556

[*First plea, general issue, as ante, 519.—Second plea, same as the last precedent, except in the statement of the demise, which is to be as follows :*] And being so seised thereof, he the said *E F* afterwards and before either of the said times when, &c. to wit, on, &c. last aforesaid, at, &c. aforesaid demised the said close, in which, &c. with the appurtenances, to the said *C D*, to have and to hold the same to the said *C D* from thenceforth, for one year, then next following, and fully to be complete and ended, and so from year to year for so long time as the said *E F* and *C D* should respectively please. By virtue, &c. (*as in the last precedent to the end, adopting the word "tenancy," instead of "term."*)

The like by
tenant from
year to year.
(y)

(y) The tenancy as to its commencement and duration, must be stated according to the fact.

Defect of fences.

Plea to declaration for trespass with cattle, and in walking, that defendant was possessed of an adjoining close, and that plaintiff ought to have repaired the fence between, and that the fence being out of repair, his cattle thereby escaped into locus in quo, and defendant entered to drive them out.(x)

* 557

Enumeration of the trespasses.

Actio non, &c.

Close mentioned in both counts the same.(a)

Defendant possessed of a close adjoining locus in quo.(b)

[*First plea, general issue, as ante, 519. Second plea, as follows :*]

And for a further plea in this behalf as to the breaking and entering the said close, in the said first count of the said declaration mentioned, and in which, &c. and with feet in walking, treading down, trampling upon, and spoiling the grass in the said close, and with the said cattle in the said first count mentioned, eating up, treading down, depasturing, consuming, and spoiling other the grass growing in the said close, and with the said cattle tearing up, eating off, pulling up, plucking off, consuming, spoiling, biting off, topping and destroying the spring wood and under wood in the said first count mentioned, and growing and being in the said close, and breaking down, throwing down, and destroying the said hedge and fence, in the said first count mentioned, growing, standing, and being round and upon the said close, and as to the breaking and entering the said close in the said last count of the said declaration mentioned, and in which, &c. and with the said cattle in the said last count mentioned, treading down, depasturing, eating up, biting off, tearing off, topping, consuming, and destroying the spring wood and under wood in the said last count mentioned, growing and being in the said last-mentioned close, above supposed to have been committed by the said *C D*, he the said *C D* by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said *A B* ought not to have or maintain his aforesaid action against him, because he says that the said close in the said first count of the said declaration mentioned, and in which, &c. and the said close in the said last count of the said declaration mentioned, and in which, &c. now are and at the said several times when, &c. were one and the same close, and not other or different closes. And

(x) See the precedents referred to in Com. Dig. Pleader, 3 M. 29. Thomp. Ent. 304. Wentw. 58. Winch. 996. or 1110. edit. 1680. Lutw. 1357. and 2 Saund. 284. As to the law, see Com. Dig. Pleader, 3 M. 29. Vin. Abr. tit. Fences, ante, 543, 349. 2 Saund. 235. u. 4.

(a) As to the allegation that the trespasses are one and the same, see vol. 1. Index, tit. Pleas in Trespass.

(b) It is sufficient in trespass to say, that the defendant was *possessed* but not in a plea in bar in replevin, 3 Saund. 284. and note 8. Com. Dig. Pleader, 3 M. 29.

the said *C D* further saith, that he the said *C D* before and at the said several times, when, &c. was lawfully possessed of a certain close called —, with the appurtenances, situate, lying and being in the parish aforesaid, in the county aforesaid, and contiguous and next adjoining to the said close of the said *A B*, in which, &c. And that the said *A B* and all other the tenants and occupiers of the said close, in *which, &c. for the time being, from time whereof the memory of man is not to the contrary, have repaired and amended, and have used and been accustomed to repair and amend, and of right ought to have repaired and amended, and the said *A B* before and at the said several times, when, &c. of right ought to have repaired and amended, and still of right ought to repair and amend, the hedge and fence between the said close of the said *C D*, and the said close, in which, &c. when and as often as occasion hath required, and shall or may require, to prevent cattle lawfully(d) feeding and depasturing, or being in the said close of the said *C D*, from erring or escaping thereout, through the defects and insufficiency of the said hedge and fence into the said close, in which, &c. and doing damage there. And the said *C D* further saith, that the said hedge and fence before and at the said several times, when, &c. were ruinous, prostrate, fallen down, and in great decay for want of needful and necessary making, repairing, and amending there-

Defect of fences.

Liability of plaintiff to repair fences of locus in quo
(c)

* 558

Fence out of repair.

(c) In the precedents in 2 Saund. 284. Lutw. 1557. a prescriptive obligation to repair, is laid in a *que estate* in the plaintiff; and according to Yelverton, 74. 76 Com. Dig. Pleader, 3 M. 29. Vin. Abr. tit. Fences, F. this was formerly considered necessary; but there are several precedents where the obligation is merely stated to be on the occupier for the time being, Thomp. Ent. 304. 9 Wentw. 58. and see Com. Dig. Pleader, 3 M. 29. and 3 T. R. 768. and according to the last case, as the defendant is presumed to be ignorant of the nature of the defendant's obligation, it is

clearly sufficient in a *declaration* to state that the defendant as occupier was bound to repair without stating an immemorial liability, and the principle of that rule appears equally to apply to a *plea*, and if so, it would suffice to lay the obligation to repair even more generally than in the above precedent, see *ante*, 349. n. (b).

(d) This allegation is not usually inserted in the precedents, see 2 Saund. 284. but the party is only bound to fence against cattle being lawfully in the adjoining close, Vin. Abr. Fences, B. 1. 2 Hen. Bl. 627.

Defect of fences.

Whereby the cattle escaped.

* 559

Defendant's entry to turn out the cattle.

of. By means whereof the said cattle in the said first and last counts of the said declaration mentioned, at the said several times, when, &c. then lawfully(*d*) feeding and depasturing in the said close of the said *C D* without the knowledge of the said *C D*, and against his will, erred and escaped *thereout into the said close, in which, &c. through the defects and insufficiency of the said hedge and fence, and eat up, trod down, depastured, consumed and spoiled a little of the grass there growing, and eat up, trod down, depastured, tore up, eat off, pulled up, plucked off, consumed, spoiled, bit off, topped, and destroyed a little of the spring wood and underwood there also growing, in the said first and last counts respectively mentioned, and in passing through the said hedge and fence, the said cattle, at the said time, when, &c. in the said first count mentioned, necessarily and unavoidably a little broke down, threw down, and destroyed the same, being the said hedge and fence, in the said first count mentioned. And on the occasions aforesaid, he the said *C D* at the said several times, when, &c. as soon as he had notice(*e*) of the said cattle having escaped into and being in the said close, in which, &c. as aforesaid, entered into the said close, in which, &c. to drive, and did then and there drive(*f*) the said cattle from and out of the said close in which, &c. into the said close of him the said *C D*, and in so doing, he the said *C D*, at the said several times when, &c. did necessarily and unavoidably, with feet in walking, tread down, trample upon, and spoil a little of the grass there also growing, doing no unnecessary damage to the said *A B* on the occasions aforesaid, and as he lawfully might for the cause aforesaid; which are the said several supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A B* hath above complained against him the said *C D*. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

(*e*) If the defendant suffered the cattle to remain in the close after notice, he will be liable as a trespasser, 2 Saund. 285. n. 4. Com. Dig. Plender, 3 M. 22. 2 Leon. 93. But this is pro-

perly the subject matter of a replication, &c. 2 Saund. 285. n. 4.

(*f*) The defendant may justify entering to recouse cattle that escaped for want of fencing, 2 Roll. Abr. L. 35. 40. Com. Dig. Plender, 3 M. 22.

*And for a further plea in this behalf, the said *C D*, by leave, *License. (g)*
 &c. says, (*actio non, &c. as ante, 421. third precedent.*) Be-
 cause he says, that he the said *C D*, at the said several times,
 when, &c. by the leave and license of the said *A B*, to him for
 that purpose first given and granted, to wit, at, &c. aforesaid,
 committed the said several supposed trespasses in the said de-
 claration mentioned; as he lawfully might for the cause afore-
 said. And this, &c. [*conclude with a verification, as ante, 422.*
sixth precedent.]

[*First plea, general issue, as ante, 519. Second plea, as follows:*] And for a further plea in this behalf, as to the fishing in the said fishery in the said first count mentioned, and the said fish there found and being, catching, seizing, taking, and carrying away, and converting and disposing there- of to his own use, the said *C D* by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said *A B* ought not to have or maintain his aforesaid action thereof against him, because he says, that the place in which the said supposed several fishery, now is and at the said several times, when, &c. was a certain close or piece or parcel of land covered with water, and which said close or piece or parcel *of land, now is and at the said several times, when, &c. was the close, soil and freehold of the said *C D*. Wherefore the said *C D*, at the said several times, when, &c. entered into the said close, piece or parcel of land, and fished there

*Rights of fish-
 ery.
 Second plea
 to trespass for
 fishing in a se-
 veral fishery,
 that the locus
 in quo was the
 defendant's
 freehold. (h)*

* 561

(*g*) As to this plea in general, see *ante*, vol. 1. Index, tit. License, Com. Dig. Pleader, 3 M. 35. Vin. Abr. tit. License, and the precedents, 9 Wentw. 85. 93. In trespass, a license must be pleaded, and cannot be given in evidence under the general issue, 2 T. R. 166. It has been usual in the introductory part of the plea to recapitulate all the trespasses, which in point of law, and in fact, may be justified by the license, but this is seldom necessary.

(*h*) As to pleas in general in trespass to fisheries, see *ante*, vol. 1. In-

dex, tit. Pleas in Trespass. Co. Lit. 122. a. 126. b. n. 7. 127. a. b. Com. Dig. Piscary. 9 Wentw. Index, 43; Boote's Suit at Law, 193 to 264. 5 Burr. 2162. 4 T. R. 437. The plea of *liberum tenementum* to trespass for fishing in a several or free fishery in good, see Year Books, 18 Edw. IV. 4. and though the subject matter of it may be given in evidence under the general issue, yet the plea is sometimes useful to compel the plaintiff to set forth in his replication his supposed right by prescription or grant.

Rights of fishery.

for fish, and the said fish in the said first count mentioned, there found and being, caught, seized, took and carried away, and converted and disposed thereof to his own use, as it was lawful for him so to do for the cause aforesaid ; which are the said several supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A B* hath above complained against him the said *C D*. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

3d. That the fishery was the defendant's several fishery.

And for a further plea in this behalf as to the said supposed trespasses in the introductory part of the said second plea mentioned, and therein justified the said *C D*, by like leave, &c. (*actio non, as in the last plea.*) Because he says, that the said fishery in the said first count mentioned, and in which, &c. now is, and at the said several times, when, &c. was the several fishery of the said *C D*. Wherefore he the said *C D*, at the said several times, when, &c. being seasonable times of the year for that purpose, fished in the said fishery in the said first count mentioned, and the said fish in the said first count mentioned, there found and being, caught, seized, took and carried away, and converted and disposed thereof to his own use ; as it was lawful, &c. [*As in the last plea to the end.*]

4th. Plea that the defendant has a free fishing in the fishery.

[*Fourth plea, same introduction as the last.*] Because he says that he the said *C D*, before and at the said several times, when, &c. in the said first count mentioned, was and still is seised in his demesne as of fee, of and in divers, to wit, two thousand acres of land with the appurtenances, situate, lying, and being in the parish aforesaid, and that he the said *C D*, and all those whose estate he now hath, and at the said several times, when, * &c. had, of and in the said land with the appurtenances, from time whereof the memory of man is not to the contrary, have had and have been used and accustomed to have, and of right ought to have had, and the said *C D* still of right ought to have, a free fishery in the said fishery in the said first count mentioned, in which, &c. and during all the time aforesaid fished, and have been used and accustomed to fish, and of right ought to have fished, and still of right ought to fish in the same fishery for fish every year at all seasonable times of the year for fishing, at his and their free will and pleasure, and

to take and carry away the fish from time to time caught by them therein as belonging and appertaining to the said land with the appurtenances. Wherefore be the said *C D*, at the said several times, when, &c. in the said first count mentioned, the same being seasonable times of the year for that purpose, fished in the said fishery in this plea mentioned, and in which, &c. And the said fish in the said first count mentioned, there found and being, took and carried away and converted and disposed thereof to the use of him the said *C D*, as he lawfully, &c. [*Same conclusion as in the second plea, ante, 561.*]

Rights of fishery.

The plea of common of fishery is precisely similar to the last plea of free fishery, inserting the words "*common of fishery*," instead of the words "*a free fishery*."

5th. Common of fishery.

[*Same introduction as in the plea, ante, 561.*] Because he says that the said supposed fishery, in which, &c. at the said several times, when, &c. was, and still is, and from time immemorial, hath been part and parcel of the said river, called the, &c. and that the said part thereof, in which, &c. now is and at the said several times, when, &c. was and from time whereof the memory of man is not to the contrary, hath been a public and common navigable river, in which the tides and waters of the sea during all the time aforesaid, have flowed and reflowed, and that in the said part of the same river *called the, &c. in which, &c. every subject of this realm at the said several times, when, &c. of right had, and of right ought to have had, and still hath, and of right ought to have the liberty and privilege of fishing. Wherefore the said *C D*, being a subject of this realm at the said several times, when, &c. entered into the said fishery, in which, &c. so being part of the said navigable river as aforesaid, where the tides and waters of the sea flow, to fish in the said river there, at the said several times, when, &c. being seasonable times of the year for such fishing, and at those several times did fish there, as it was lawful, &c. [*conclude as in the plea, ante, 561.*]

6th. Locus in quo a navigable river, and all the king's subjects have right to fish therein.

Rights of common.

Justification by a freeholder and his servant, under a prescriptive right of common of pasture. (i)

[First plea, general issue, as ante, 519. Second plea, enumerating the trespasses proposed to be justified, namely, the entry on the land and putting on cattle, and filling up ditches, breaking down fences, &c. as in the declaration, and then by leave, &c. *actio non*, &c. as ante, 552. and stating the scisin in fee, and prescriptive right of common in the defendant, as ante, 517, 518. or if the defendant be a tenant, after stating the scisin in fee and the right of common, set forth the demise, as ante, 215. or 516. and then proceed as follows:] Wherefore he the said *C D* in his own right, and the said *E F*, as his servant, and by his command, at the said times, when, &c. entered into the said close, in which, &c. in order to turn and put, (k) *and did then and there turn and put into and upon the same, the said horses, mares, geldings, cows, oxen and sheep in the said first count of the said declaration mentioned, being the said *C D*'s own commonable cattle, *levant* and *couchant* in and upon the said last mentioned land with the appurtenances, to use ‡ the said common of pasture of the said *C D* there, and in so doing they the said *C D* and *E F*, at the said times, when, &c. with their feet in walking, necessarily and unavoidably trod down, trampled upon, spoiled, consumed and destroyed a little of the grass and hay, herbs, roots, shrubs and bushes there growing and being, and with the said horses, mares, geldings, cows, oxen and sheep in the said first count mentioned, necessarily and unavoidably trod down, trampled upon, spoiled, eat up, depastured, consumed and destroyed a little other of the grass and hay, herbs, roots, shrubs and bushes

* 564

(i) See the precedents referred to, 9 Wentw. Index, 44 to 50. If the right of common be qualified either for a limited number or a particular description of cattle, or at particular times of the year, or if the defendant have any land in the *locus in quo*, the plea must be framed accordingly. See also the precedents, Rast. 618. 1 Saund. 222. and the notes to 1 Saund. 339 to 346. and 347 to 353. and 2 Saund. 1 to 6. and 324 to 329. and Com. Dig. Pleader, 3 K. 24. and tit. Common. As to the mode of plead-

ing rights of common in general, see also the precedents, ante, 354 to 358. If there be any reason to apprehend that the *prescriptive* right of common may have been extinguished by unity of possession, it is proper to add a plea claiming the right of common by non-existing grant, as in the plea of a right of way by grant, post, 575. See vol. 1. tit. Pleas in Trespass.

(k) This allegation seems proper, 1 Roll. Abr. 406. l. 8. Com. Dig. Common, H.

there also growing and being ; and because the said close, in which, &c. before and at the said time, when, &c. had been and was wrongfully inclosed, with and by means of the said ditches and fences, and gates in the said first count of the said declaration mentioned, before then wrongfully dug and made and put and placed in and upon the said close, in which, &c. so that without filling up and levelling the said ditches and fences, and removing the said gates, the said *C D* could not use or enjoy his said common of pasture, in, upon, and throughout the said close, in which, &c. in so ample and beneficial a manner as he otherwise might, and would, and ought to have done, he the said *C D*, in his own right, and the said *E F*, as the servant of the said *C D*, and by his command, at the said several times, when, &c. with the said pickaxes, hatchets, saws and mattocks, and other instruments in the said first count mentioned, filled up and levelled the said ditches, and dug up, threw down, and prostrated the said fences and gates in the said first count mentioned, and took and carried the said gates to a small and convenient distance, where they left the same for the use of the said *A B*, doing no unnecessary damage to the said *A B*, on the occasions aforesaid, and as they lawfully might for the cause aforesaid, which are the said several supposed trespasses in the introductory part of this plea mentioned, whereof the said *A B* hath above complained against the said *C D* and *E F*. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

Rights of common.

Because the common was wrongfully inclosed by the ditches, &c. defendant prostrated same. (1)

* 565

[*First plea, general issue, as ante, 519. Second, enumerate the trespasses intended to be justified as directed in the last precedent, and then say by leave, &c. actio non, &c. as ante, 552.*]

The like by a copyholder. (m)

(1) A commoner may justify abating a fence wrongfully erected upon the common, but not trees planted therein, 6 T. R. 487. 2 Mod. 65. Com. Dig. Common, H.

(m) See the notes to the last precedent, and as to the pleading right of common by a copyholder, 1 Saund. 348 to 353. in notes. See the mode

of setting out the title to copyhold, ante, 205, 206, 207. If the justification be by the tenant of a copyholder, the plea will be as in the above precedent, and after the statement of the grant to the copyholder, and his entry setting forth the demise to the defendant and his entry, as ante, 215. or 516.

*Rights of
common.*

Because he says that the said close, in which, &c. before and at the said several times, when, &c. was and is within and parcel of (n) the manor of —, in the said county; and that a certain messuage, and divers, to wit, — (o) acres of land with the appurtenances, situate and being in the parish of — aforesaid, now are and at the said several times, when, &c. were, and from time immemorial have been within and parcel of the said manor of —, and a customary tenement of that manor demised and demisable by copy of the court rolls of the same manor, by the lord of the said manor, or his steward of the court of the same manor, or the deputy steward of the said court for the time being, to any person or persons willing to take the same in fee-simple, *at the will of the lord, according to the custom of the said manor; and the said *C D* further says, that within the said manor, there is, and from time whereof the memory of man is not to the contrary, hath been, a certain ancient and laudable custom there used and approved of, (that is to say,) that every customary tenant of the said last-mentioned customary tenement with the appurtenances for the time being, from time whereof the memory of man is not to the contrary, hath had, and hath used, and been accustomed to have, and of right ought to have had, and still of right ought to have for himself, herself, his or her farmers, occupiers of such customary tenement with the appurtenances, common of pasture in, upon and throughout the said close, in which, &c. for all his, her, and their commonable cattle *levant* and *couchant* in and upon the same customary tenement with the appurtenances, every year, at all times of the year, at his and their free will and pleasure, as belonging and appertaining to such customary tenement; and he further says, that long before any of the said times, when, &c. to wit, on, &c. *A. D.* —, one *E F*, then being lord of the said manor of —, at his court held in and for the said manor, before —, gent. then deputy steward of the said court, by copy of the court rolls of the said manor, granted to the said

Grant of the
copyhold to
defendant.

(n) This allegation seems material, not as in the above precedent. 1 for if the *locus in quo* be not parcel of the manor, the defendant must prescribe in the name of the lord, and is not material. Saund. 349. n. 11.

(o) The precise number of acres

C D (amongst other things) the said last-mentioned customary tenement with the appurtenances, to hold to the said *G H*, his heirs and assigns for ever, by copy of the court roll of the said manor, at the will of the lord of the said manor, according to the custom of the said manor; by virtue of which said grant, the said *C D* afterwards, and before any of the said times, when, &c. to wit, on the day and year last aforesaid, entered into the said customary tenement with the appurtenances, and became, and was, and still is, thereof seised in his demesne as of fee, at the will of the lord according to the custom of the said manor, and at the said several times, when, &c. was in the actual occupation thereof, and entitled to such common of pasture as aforesaid. Wherefore, &c. the said *C D*, at the said *several times, when, &c. having occasion to use his said common of pasture, entered the said close, in which, &c. in order to put, and did then and there put into and upon the same. the said cattle in the said declaration mentioned, being his own commonable cattle, *levant and couchant*, in and upon the said last-mentioned customary tenement, to use, &c. [*Justify the trespasses as in the last precedent in page 564. from the fact, and according to the fact.*]

Rights of common.

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[*First plea, general issue, as ante, 519. Second, enumerate the trespasses with the cattle, &c. intended to be justified, as directed in the precedent, ante, 563. and then by leave, &c. action non, &c. as ante, 552.*] Because he says, that the said close called —, in which, &c. at the said times, when, &c. lay, and from time immemorial hath lain, and still doth lie, contiguous and next adjoining to a certain other close or piece or parcel of land, called —, containing divers, to wit, — acres of land, situate and being in a certain part of the said parish of —, which lies in the county of —, and hath never been separated or divided from the said last-mentioned close called

Common pasture cause de vicinage. (p)

(p) See the notes to the precedents, ante, 563. &c. and Com. Dig. tit. Common, E. Common *pur cause de vicinage* being merely an excuse for a trespass with cattle, the defendant cannot justify pulling down fences, &c. Com. Dig. tit. Common, E.

*Rights of
common.*

* 568

—, in the said county of —, by any inclosure, hedge, or fence whatsoever, sufficient to prevent cattle from time to time feeding and depasturing in the said close called —, in the said county of —, from erring or escaping therefrom into the said close called —, in which, &c. And that the said cattle from time to time, during all that time put into the said close called —, to feed on the grass there then growing, from time immemorial have gone, escaped and rambled, and have been used and accustomed to go, escape, and ramble therefrom into the said close, called —, in which, &c. and to intermix there, and feed with cattle from time to time, feeding on the grass growing in the said last-mentioned *close; and in like manner the cattle from time to time, during all that time put into the said close called —, in which, &c. to feed on the grass there then growing, from time immemorial have gone, escaped and rambled, and have been used and accustomed to go, escape, and ramble therefrom into the said close called —, in the said county of —, and to intermix there, and feed with cattle from time to time feeding on the grass growing in the said last-mentioned close. And the said *C D* further saith, that the said close, called —, in the said county of —, before and at the said time, when, &c. was the close, soil, and freehold of one *E F*, and that the said cattle of the said *C D* in the said declaration mentioned, just before the said time, when, &c. to wit, on the same day and year aforesaid, were in and had been put into the said close called —, in the said county of —, to feed on the grass there then growing, by the leave and license of the said *E F* to him the said *C D* in that behalf first given and granted, to wit, at the parish aforesaid, in the county aforesaid; and the said *C D* further says, that the said cattle so being put and being in the said close called —, in the said county of — as aforesaid, for the purpose aforesaid, and the said close called —, in which, &c. so being and lying contiguous thereto, and not separated or divided therefrom by any inclosure, hedge, or fence whatsoever, the said cattle of him the said *C D*, afterwards, and just before the said time, when, &c. to wit, on the same day and year aforesaid, of their own accord, and without the knowledge or consent of him the said *C D*, went, escaped and rambled, from and out of the said close called —, in the

said county of —, into the said close called —, in which, &c. and intermixed and fed with the cattle there then feeding on the grass there then growing, and remained and continued in the said close called —, in which, &c. on the occasion aforesaid, without the knowledge of the said *C D*, and there eat, &c. [*Here justify the trespasses with the cattle as in the precedent, ante, 564. and conclude as therein directed.*]

Rights of common.

* 569
[*First plea, general issue, as ante, 519. Second plea, as follows:*] And for a further plea in this behalf, as to, &c. *Common of estovers, &c. (q)*
(*state the entry on foot, and with carriages, throwing down of posts and fences, &c. and other trespasses which may be justified, and then say by leave, &c. actio non, &c. as ante, 552, and then as follows:*) Because he says that the said close, in which, &c. before and at the said several times, when, &c. had divers large quantities of bushes and underwood growing thereon; and the said *C D* further saith, that he the said *C D* before and at the said several times, when, &c. was seized in his demesne as of fee, and of a certain messuage with the appurtenances, situate and being in the parish aforesaid, and that he the said *C D*, and all those whose estate he now hath, and at the said several times, when, &c. had, of and in the said last-mentioned messuage with the appurtenances for the time being, from time whereof the memory of man is not to the contrary, have had and taken, and been used and accustomed to have and take, and of right ought to have had and taken, and the said *G H* still of right ought to have and take reasonable estovers of the bushes and underwood standing and growing in and upon the said close, in which, &c. and to carry the same from thence to the said messuage with the appurtenances, to be burnt, spent, and consumed for fuel therein every year, at all seasonable times of the year, at his and their free will and pleasure, as belonging and appertaining to such last-mentioned messuage with the appurtenances. Wherefore he the said *C D* at the said several times,

(q) See the notes to the precedent, *mon of turbary*, 7 East, 121. and *ante*, 358. and Thomp. Ent. 377. *ante*, 357. and of a right to dig stones, See the precedents of pleas of com. 6 T. R. 748.

*Rights of
common.*

• 570

when, &c. having occasion for such reasonable estovers as aforesaid, to be burnt and consumed for fuel in the said last-mentioned messuage, at the said several times, when, &c. being seasonable times of the year in that behalf, entered the said close in which, &c. with the said cattle and carriages in the said declaration mentioned, in order to take and carry such *reasonable estovers as aforesaid, from thence to the said last-mentioned messuage, to be burnt, used, and consumed for fuel therein; and the said *C D* on those occasions, with his feet in walking, and by and with the said cattle and carriages, a little trod down, trampled upon, consumed and spoiled the grass and herbage then growing and being in the said close, and subverted, damaged and spoiled the soil of the said close, and because the said stakes, banks, mounds, gate-posts, and other posts in the said declaration mentioned, before the said several times, when, &c. had been wrongfully erected, and were then standing and being in and upon the said close, in which, &c. and partly inclosing the same, so that without some digging up, pulling up, tearing up, breaking down, throwing down, prostrating and destroying the said banks, mounds, and fences, gate-posts, and other posts respectively, the said *C D* could not then have, take and carry from the said close such reasonable estovers as aforesaid, to be burnt, used and consumed for fuel in the said last-mentioned messuage, as he otherwise might and ought to have done; he the said *C D* at the said several times, when, &c. in order to remove such obstructions as last aforesaid, dug up, tore up, broke down, threw down, prostrated and destroyed the said stakes, banks, mounds, fences, gate-posts, and other posts in the said declaration mentioned, and took and carried the said gate-posts and other posts to a small and convenient distance, where he left the same for the use of the said *A B*, doing no unnecessary damage to the said *A B* on those occasions; which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A B* hath above complained against him the said *G D*. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

[*First plea, general issue, as ante, 519. Second plea, as follows:*]

And for a further plea in this behalf, as to the *entering the said close of the said *A B* in the said first count of the said declaration mentioned, and in which, &c. and with feet in walking, and with the said cattle and carriages in the said declaration mentioned, treading down, trampling upon, crushing, consuming and spoiling the grass and herbage then growing and being in the said close, and subverting, damaging, and spoiling the soil of the said close, and digging up, pulling up, tearing up, prostrating and destroying the said stakes and posts in the said first count mentioned, and with the said cattle in the said declaration mentioned, eating up and depasturing the said other grass of the said *A B*, there also growing and being, and also as to the breaking down, throwing down, prostrating and destroying the said banks, mounds, and fences in that count mentioned, and also as to digging up, pulling up, prostrating, damaging and destroying the said gate-posts, and other posts in the said last count of the said declaration mentioned, and taking and carrying away the same, above supposed to have been done by the said *C D*, he the said *C D*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in that case made and provided, saith that the said *A B* ought not to have or maintain his aforesaid action thereof against him, because he says, that the said posts in the said first count mentioned, and the said posts in the said last count mentioned, were and are the same, and not other or different posts. † And the said *C D* further saith, that before and at the said several times, when, &c. there was, and of right ought to have been, a certain common and

Public way for carriages, &c.
(r)

* 571

Enumeration of the trespasses intended to be justified. (s)

The public way.

(r) See the precedents, 9 Wentw. Index, 56. 1 Hen. Bl. 351. In pleading a public way it is not necessary to state the *termini*, or to shew that it was immemorially a way, the term public highway being sufficient, 1 Hen. Bl. 351—355. 2 Saund. 158. d. *Ante*, 359. n. (n). 8 East, 6. 3 T. R. 265. 8 T. R. 608. If it be not a way for all purposes, as merely for horses,

or on foot, &c. the plea must be qualified accordingly. See a precedent of right of way by inhabitants of a town. Lutw. 1507.

(s) The enumeration of the trespasses must necessarily depend on the declaration, and the facts of each particular case; this precedent is only calculated to meet the facts which usually occur in practice.

Public ways. public highway, into, through, over and along the said close, in which, &c. for all the liege subjects of our lord the king, to go, return, pass, *and repass on foot and with cattle and carriages at all times of the year at their free will and pleasure.

* 572

Wherefore defendant entered, and the cattle by stealth and morsels eat the grass in the way.

Because the fences, &c. obstructed the way, defendant prostrated same and carried materials to a convenient distance.

Wherefore the said *C D* being a liege subject of our said lord the king, at the said several times, when, &c. went, passed, and repassed on foot, and with the said cattle and carriages into, through, over and along the said close, in which, &c. in, by, and along the said highway there, using the same as he lawfully might for the cause aforesaid. † And in so doing, he the said *C D* with his feet in walking, and with the said cattle and carriages, unavoidably a little trod down, trampled upon, consumed and spoiled the grass and herbage there growing and being in the said close, in which, &c. and subverted, damaged, and spoiled the soil of the same close, and the said cattle at the said several times, when, &c. in passing and repassing along the said way, by stealth and morsels, and against the will of the said *C D*, eat up and depastured a little other of the grass there then growing in the said way. And because the said stakes, banks, mounds, fences, gate-posts and other posts, in the said declaration mentioned, before the said several times, when, &c. had been wrongfully erected, and were then standing and being in and across the said highway, and obstructing the same, so that without digging up, pulling up, tearing up, breaking down, throwing down, prostrating and destroying the said stakes, banks, mounds, fences, gate-posts and other posts respectively, the said *C D* could not then pass and repass with the said cattle and carriages into, through, over, and along the said close, in which, &c. in the said highway there as he ought to have done, the said *C D*, at the said several times, when, &c. in order to remove the said obstructions, dug up, pulled up, tore up, broke down, prostrated and destroyed, the said stakes, mounds, fences, gate-posts and other posts in the said declaration mentioned, and took and carried the said gate-posts and other posts to a small and convenient distance, and there left the same for the use of the said *A B*, doing no unnecessary damage to the said *A B* on those occasions, which are the same supposed trespasses in the introductory part *of this plea mentioned, and whereof the said *A B* hath above complained

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against him the said *C D*. And this, &c. [*conclude with a Private ways, verification, as ante, 422. sixth precedent.*]

[*First plea, general issue, as ante, 519. Second plea, same as the last precedent to the obelisk, ante, 571. and then proceed as follows :*] And the said *C D* further saith, that he the said *C D* long before, and at the said several times, when, &c. was and still is seised in his demesne as of fee, of and in the occupation of a certain close, called —, contiguous and next adjoining to the said close, in which, &c. and that he the said *C D*, and all those whose estate he now hath, and at the said several times, when, &c. had, of and in the said close called —, from time whereof the memory of man is not to the contrary, have had and used, and have been accustomed to have and use, and of right ought to have had and used, and the said *C D*, at the said times, when, &c. of right ought to have had and used, and still of right ought to have and use, a certain way for himself and themselves, and his and their servants, farmers and tenants, occupiers of the said close called —, to pass and repass on foot and with horses, mares, geldings, and other cattle, from a certain common king's highway, in the parish of — aforesaid, into, through, over, and along the said close of the said *A B*, called —, in which, &c. unto and into the said close now of the said *C D*, and so from thence back again unto, into, through and over and along the said close of the said *A B*, called —, in which, &c. unto and into the said common king's highway, at all times of the year, at his and their free will and pleasure, as to the said close of the said *C D*, with the appurtenances belonging *and appertaining.^(u) And the said *C D* being so seised of his said close, and having occasion to use the said way, did, with his

Private way
by prescription
by a freeholder.^(t)

* 574

(t) See the precedents, Lutw. 1426, 1427. 1527. and *ante*, 358 to 362. As to the mode of pleading a private right of way in general, see Com. Dig. Chimin, D. 2. &c. Vin. 360. n. (p), and the precedents, Abr. tit. Chimin, Private, H. Bac. Lutw. 1527. Rast. Ent. 617. a. b. 618. a. b. Lil. Ent. 462. 1 East, 377. 1 H. Bl. 351.

(u) See the precedents, Lutw. 1426, 1427. and 119. Lil. Ent. 426. 362. As to the mode of pleading a private right of way in general, see Com. Dig. Chimin, D. 2. &c. Vin. 360. n. (p), and the precedents, Abr. tit. Chimin, Private, H. Bac. Lutw. 1527. Rast. Ent. 617. a. b. 618. a. b. Lil. Ent. 462. 1 East, 377. 1 H. Bl. 351.

351—355.

Private ways. servants and horses, and mares, and geldings, and carriages, at the said several times, when, &c. pass and repass, in, by, through and along the said way from the said common king's highway, into, through, over, and along the said close of the said *A B* called —, in which, &c. unto and into the said close now of the said *C D*, and so from thence back again, in, by, through, and along the said way, unto and into the said common king's highway, using the said way there for the purpose and on the occasion aforesaid, as he lawfully might for the cause aforesaid, and in so doing, &c. [*Same as the precedent, ante, 572. from the § to the end, justifying the trespasses according to the facts, observing the introductory part of this plea.*]

The like by a
copyholder.
(x)

[*Enumerate the trespasses as in the precedent, ante, 571. to the obelisk, and then say, actio non, &c. and state that the locus in quo was parcel of the manor, and state the customary tenement, as ante, 565. and then at 566. state the customary right of way, as follows :*] And the said *C D* further saith, that within the said manor there now is, and at the said times, when, &c. was, and from time whereof the memory of man is not to the contrary hath been, a certain ancient and laudable custom, there used and approved of, (that is to say,) that every customary tenant of the said customary tenement, with the appurtenances for the time being, from time whereof the memory of man is not to the contrary hath had, and hath been used and accustomed to have, and of right ought to have had, and still of right ought to have, for himself and his servants, a certain way to go, return, pass, and *repass on foot, and with cattle and carriages, from and out of the said customary tenement, into, through, and over the said close, in which, &c. unto and into a certain public road and king's common highway at —, in the said parish of —, and so from thence back again into the said customary tenement, with the appurtenances, every year, at all times of the year, when and as often as occasion hath required, as belonging and appertaining to such custom-

* 575

(x) See the notes to the last precedent, and the precedent, 9 Wentw. 255. And as to the mode of pleading by a copyholder in general, see *ante*, 565. n. (m). 205, 206, 207.

ary tenement. And he further says, that long before any of the said times, when, &c. to wit, on, &c. (*state the grant to the copyholder, and his entry, as ante, 566. and then proceed as follows :*) wherefore the said *C D*, at the said several times, when, &c. having occasion to use the same way, went, passed, and repassed on foot, and with cattle and carriages from and out of the said customary tenement, into, through, and over the said close, in which, &c. by and along the said way there, using the same as he lawfully might for the cause aforesaid. And in so doing, &c. [*Same as the precedent, ante, 572. from the † to the end, justifying the trespasses according to the fact, observing the introductory part of the plea.*]

[*First plea, general issue, as ante, 519. Second plea, prescriptive right of way, as ante, 573. Third plea, as follows :*]

Right of way
by non-exist-
ing grant. (y)

And for a further plea in this behalf, as to the said several supposed trespasses in the introductory part of the said second plea mentioned, and therein justified, the said *C D* by like leave, &c. says, (*actio non, as ante, 422. fourth precedent,*) because he says, that he the said *C D* long before, and at the said several times, when, &c. was, and from thence hitherto hath been, and still is, seised in his demesne as of fee of and in the occupation of *a certain close, situate, lying, and being in the parish of — aforesaid ; and the said *C D* further saith, that long before any of the said several times, when, &c. to wit, on, &c. at, &c. aforesaid, by a certain deed made between the then owner of the said close, in which, &c. and the then owner of the said close now of the said *C D*, and whose estate therein he the said *C D* now hath, but which deed hath since been lost and destroyed by accident, and therefore cannot be brought into the said court here, and the date whereof is for that reason

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(y) Where there has been an actual grant of a way, the plea must be framed accordingly, see 1 B. & P. 371. 3 East, 294. When there is any reason to apprehend that a prescriptive right of way may have been extinguished by unity of possession, it must then be claimed as a way by non-existing grant as in the above precedent, and the uninterrupted use of the way for a long time, is evidence from which the jury may presume a grant, 3 T. R. 157. 1 Saund. 323. a. 1 East, 381.

Private ways. wholly unknown to the said *C D*, the said then owner of the said close, in which, &c. did grant to the said then owner of the said close now of the said *C D*, and to the heirs and assigns of the last-mentioned owner, a certain way from a certain public king's highway, in the parish aforesaid, into, through, over, and along the said close, in which, &c. unto and into the said close now of the said *C D*, and so back again from the said last-mentioned close, into, through, over, and along the said close, in which, &c. unto and into the said public king's highway, to go, return, pass and repass on foot by himself, and themselves, and his and their servants, and with horses, mares, and geldings, carts and carriages, in and along the said last-mentioned way, every year, and at all times of the year, at his and their free will and pleasure. By virtue of which said grant, the said *C D*, before and at the said several times, when, &c. was and still is entitled to such way as last aforesaid; and the said *C D* being so seised and entitled to such way as last aforesaid, he the said *C D*, at the said several times, when, &c. having occasion to use the said way, did with his servants, and with his said horses, mares, and geldings, carts and carriages, at the said several times, when, &c. go, pass and repass, in, by, through, and along the said way from the said common king's highway, into, through, over, and along the said close of the said *A B*, in which, &c. unto and into the said close now of the said *C D*, and so from thence back again, in, by, through, and along the said way, unto and into the said common king's highway, using the said way there *for the purpose and on the occasion aforesaid, as he lawfully might for the cause aforesaid. And in so doing, &c. [*same as in the precedent, ante, 572. from the † to the end, justifying the trespasses according to the facts, observing the introductory part of the filca.*]

* 577

Right of way
of necessity.
(z)

[*First plea, general issue, as ante, 519. Second plea, prescriptive right of way, as ante, 573. Third plea, right of way*

(z) See the precedents, Lutw: this plea, 1 Saund. 323. a. b. n. 6. 1487. 9 Wentw. 161, 162. &c. 8 T. R. 8 T. R. 50. Cro. Jac. 170. 1 B. & 50. and as to the law and the use of P. 374. n. a. Willes, 71.

by grant, as in the last precedent. Fourth plea, as follows:] *Private way.*

And for a further plea in this behalf, as to the said several supposed trespasses in the introductory part of the said second plea mentioned, and therein justified, the said *C D*, by like leave, &c. says, (*actio non, &c. as ante, 422. fourth precedent,*) because he says, that he the said *C D*, before and at the said several times, when, &c. was and still is seised in his demesne as of fee, of and in a certain close called — contiguous and next adjoining to the said close, in which, &c. and that a certain person whose name is to the said *C D* unknown, and whose estate in the said close called —, the said *C D* now hath, and before, and at the time of the making of the alienation and conveyance hereinafter mentioned, was seised in his demesne as of fee, as well of and in the said close, in which, &c. as of the said other close now of the said *C D*, with their respective appurtenances; and the same person being so seised of the said closes respectively, long before any of the said several times, when, &c. to wit, on, &c. *A. D.* —, at the parish aforesaid, duly granted, aliened and conveyed the said close, in which, &c. to a certain other person whose name is to the said *C D* unknown, and to the heirs and assigns of such last-mentioned mentioned person; by means whereof the said last-mentioned person then and there became and was seised in his demesne, as of fee, of and in the said close, in which, &c. and the said *C D* further saith, that at the time of *the said alienation and conveyance of the said close, in which, &c. the said person who was so seised thereof, and so aliened and conveyed the same as aforesaid, not having any other way to the said close, now of the said *C D*, otherwise than from and out of a certain public highway in the county aforesaid, into, through, over and along the said close, in which, &c. by reason thereof the said person who so aliened and conveyed the said close, in which, &c. as aforesaid, after such alienation and conveyance, necessarily, whilst he continued seised of the said close now of the said *C D*, ought to have had, and of right had, and the said *C D*, so having the estate of the said person as aforesaid, before and at the said several times, when, &c. necessarily had, and of right ought to have had, and still of right ought to have, a convenient way to the said close now of the said *C D*, from the said highway, into, through, over and along the said close,

Defendant
seised of ad-
joining close.
E F formerly
seised thereof,
and of locus in
quo.

E F aliens lo-
cus in quo.

* 578

E F having
no other way
to the other
close than o-
ver locus in
quo, of right
had such way.

Private ways.

And since the alienation *E F* &c. were entitled to the necessary way.

in which, &c. and that the said person who so aliened and conveyed the said close, in which, &c. and all the occupiers of the said close, now of the said *C D* after the said alienation and conveyance of the said close, in which, &c. had, and were accustomed to have, and of right ought to have had, and the said *C D* still of right ought to have, a certain necessary way for themselves and their servants on foot and with horses, mares and geldings, carts and carriages from the said highway, into, through, over and along the said close, in which, &c. unto and into the said close, now of the said *C D* to go and return, pass and repass, in every year, at all times of the year, for the necessary use and occupation of the said close now of the said *C D*, the same way being the nearest and most convenient way over the said close, in which, &c. to the said close now of the said *C D*; wherefore, at the said several times, when, &c. the said *C D* being so seised as aforesaid, and in the actual occupation of his said close, and having occasion to use the said way, did with his servants, and with his horses, mares and geldings, carts and carriages, at the said several times, when, &c. pass and repass, in, by, through and along the said way, from the *said common king's highway, into, through, over and along the said close of the said *A B*, in which, &c. unto and into the said close now of the said *C D*, and from thence back again, in, by, through and along the said way unto and into the said common king's highway; using the said way there for the purpose and on the occasion aforesaid, as he lawfully might for the cause aforesaid. And in so doing, &c. [*same as the precedent, ante, 572 from the † to the end, justifying the trespasses according to the facts, observing the introductory part of the plea.*]

* 579

Private way by a tenant under a lease, or from year to year in either of the above cases.

[*See the precedents, Rast. Ent. 618. a. b. Lutw. 1427. The plea stating the possessory right will resemble that claiming a right of common by a tenant as pointed out, ante, 563. The lease for years, or the demise from year to year, and the entry of the lessee are to be stated, as ante, 215. 516. and where the defendant claims under a freeholder by prescription, are to be inserted in the precedent, ante, 574. immediately after the statement of the right of common; and if under a copyholder, immediately*

after the statement of the grant of the customary tenement and the copyholder's entry, ante, 575.] Entry for tithes.

[*First plea, general issue, as ante, 519.*] And for a further plea in this behalf, as to the breaking and entering the said close in the said declaration mentioned, and with feet in walking, treading down, trampling upon, consuming and spoiling the grass and corn of the said *A B* there then growing, and with the wheels of the said carts, waggons and other carriages, and with the feet of the said cattle drawing the same, treading down, trampling upon, consuming and destroying other the grass and corn of the said *A B*, there standing and being in shocks and sheaves, and the said quantities of corn in the said close, taking and carrying away, and converting and disposing thereof to their own use, above supposed to have been done by the said *C D* and *E F*, they the said *C D* and *E F*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in that case made and provided, say, that the said *A B* ought not to have or maintain his aforesaid action thereof against them, because they say, that the said *C D*, long before, and at the said time, when, &c. was, and from thence hitherto hath been, and still is, rector of the rectory of the parish church of —, in the said county of —, and that the said close in the said declaration mentioned, called, &c. in which, &c. at the said several times, when, &c. in the said first count mentioned, was situate, lying and being in the parish of — aforesaid, and within the bounds, limits and titheable places of the same parish, and that all and singular the tithes of corn and grain yearly arising, growing, renewing and happening in, upon and from the said close, in which, &c. from time whereof the memory of man is not to the contrary, of right ought to have been, and still of right ought to be, yielded and paid in kind to the rector of the said rectory for the time being. And the said *C D* and *E F* further say, that divers quantities of wheat, oats and barley, in the year of

Justification of entry on land to take tithes.
(a)

* 580

(a) See the precedents, 9 Wentw. As to the replication, see Cro. Jac. Index, 86. and 10 Co. 88. a. 91. a. 224. and Yelv. 157. and Com. Dig. and Com. Dig. Pleader, 3 M. 40. Pleader, F. 18, 19.

*Entry for
tithe.*

* 581

our lord — aforesaid, grew and arose in the said close, in which, &c. and that before any of the said times, when, &c. in the said first count mentioned, to wit, on, &c. in the year last aforesaid, the said last-mentioned wheat, oats and barley were cut down, and the tenth part thereof duly severed from the residue thereof, and set out as and for the tithe of the said last-mentioned wheat, oats and barley, according to the immemorial usage and custom within the said parish, and were at the said times, when, &c. in the said first count mentioned, in the said close for the use of him the said *C D* as such rector as aforesaid, whereupon the said *C D* as such rector as aforesaid, and the said *E F* as his servant, and by his command, afterwards, to wit, on the said first time, when, &c. in the said first count mentioned, the same being respectively *within a reasonable time after the cutting down of the said wheat, oats and barley, entered the said close, in which, &c. with the said carts, waggons, and other carriages in the said declaration mentioned, drawn with the said cattle therein also mentioned, in, by, through, and along the usual way and entrance into the said close, in which, &c. and to take, fetch, and carry away the said tithes, the same being the said corn in the said first count mentioned, and therein alleged to have been taken and carried away by the said *C D* and *E F*, and the same having been so severed and set out as aforesaid, and did then and there within a reasonable time for that purpose, take and carry away the same out of the said close, in which, &c. in the said waggons, carts and other carriages, and converted and disposed thereof to their own use, and in so doing he the said *C D*, and the said *E F* as his servant as aforesaid, did at those respective times, with their feet in walking, necessarily and unavoidably tread down, trample upon, consume, and spoil a little of the grass and corn of the said *A B*, growing and being in the said close, and with the wheels of the said carts, waggons, and other carriages, and with the feet of the said cattle drawing the same, did necessarily and unavoidably tread down, trample upon, consume and spoil a little of the grass and corn of the said *A B* there growing, and the said cattle drawing the said carriages while the said tithes were so being taken, fetched, and carried away as aforesaid by stealth and morsels, and against the will of the said *C D* and *E F*, eat up,

consumed, and destroyed a little of the corn of the said *A B*, in the said close, in shocks and sheaves, the said *C D* and *E F* doing no unnecessary damage to the said *A B*, on the occasion aforesaid, which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A B* hath above in the said first count in that behalf complained against the said *C D* and *E F*. And this, &c. [conclude with a verification as ante, 422. sixth precedent. Add a plea of license, as ante, 560. if there be any evidence to support it.]

*[First plea, general issue, as ante, 519. Second plea, as follows:] And for a further plea in this behalf, as to the breaking and entering the said dwelling-house of the said *A B*, in the said first count of the said declaration mentioned, and making a noise and disturbance therein, and staying and continuing therein making such noise and disturbance, without the leave or license, and against the will of the said *A B*, for the said space of time in the said first count mentioned, and then and there forcing and breaking open, breaking to pieces, damaging and spoiling the said doors, windows, locks, bolts, bars, staples, and hinges of the said *A B*, in the said first count mentioned, the said *C D* by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, saith, that the said *A B* ought not to have or maintain his aforesaid action thereof against him; because he saith, that before the said time, when, &c. in the said first count mentioned, to wit, on, &c. (the teste of the writ; here set forth the writ of latitat, the indorsement for bail, delivery of the writ to the sheriff, and warrant to the defendant, and delivery thereof to the defendant, as in the precedent, ante, 538 to 540.) By virtue of which said warrant the said *C D* as such bailiff as aforesaid, afterwards and before the time appointed for the return of the said writ, to wit, at the said time, when, &c. in the said first count mentioned, and within the bailiwick of the said *G H*, as such sheriff as aforesaid, peaceably and quietly entered into the said dwelling-house, in which,

* 582
Justification
of entry into
house, and
breaking in-
ner doors, &c.
under a *lati-
tat*, and she-
riff's warrant
thereon.(b)

(b) See the precedent, Thomp. ral, 3 B. & P. 229.
Ent. 299. and as to this plea in gene-

*Under meane
process.*

* 583

&c. the outer doore thereof then and there being open, and there then and there being reasonable and sufficient ground and cause for the said *C D*, to suspect and believe, and the said *C D* then and there suspecting and believing that the said *A B* then was in the said dwelling-house, in order to take and arrest the said *A B*, under and by virtue of the said writ and warrant, as it was lawful for him to do for the cause aforesaid; and in order to arrest the said *A B*, under and by virtue of the said writ and warrant, he the said **C D* did then and there necessarily and unavoidably make a little noise and disturbance in the said messuage or dwelling-house, and stay and continue therein making such noise and disturbance for the said space of time in the said first count mentioned. And the said *C D* further saith, that at the said time, when, &c. in the said first count mentioned, the said *A B* not having been taken or arrested under or by virtue of the said writ or warrant, and the entrance of divers, to wit, — rooms and — apartments in the said dwelling-house, in the said first count mentioned, and of and belonging to the same, being fastened and stopped by and with the said doors, windows, locks, bolts, bars, staples and hinges in the introductory part of this plea mentioned, and there then and there being reasonable and sufficient ground and cause for the said *C D* to suspect and believe, and the said *C D* then and there suspecting and believing, that the said *A B* then was in the said rooms and apartments, or one of them, he the said *C D* did then and there demand and request one *I K*, being the only person then and there present in the said dwelling-house, to deliver the keys of the said respective doors to him the said *C D*, and to permit and suffer him the said *C D* to enter into the said rooms and apartments, in order to search for the said *A B* therein, but the said *I K* then and there wholly neglected and refused so to do, and then and there obstructed and hindered the said *C D* from entering into the said rooms and apartments, or either of them, for the purpose aforesaid,^(c) so that without forcing and breaking open the said doors, windows, locks, bolts, bars, staples and hinges, the said *C D* could not at the said time, when, &c. enter into the

(c) These allegations must be according to the facts, 3 B. & P. 229.

said rooms and apartments, to search for or arrest the said *AB* in the same; therefore he the said *CD*, at the said time, when, &c. in the said first count mentioned, in order to search for, find, and arrest the said *AB*, under and by virtue of the said writ and warrant, necessarily broke open the said doors, windows, locks, bolts, bars, *staples and hinges in the said first count mentioned, and in so doing necessarily and unavoidably a little broke to pieces, damaged, and spoiled the same, doing no unnecessary damage to the said *AB* on the occasion aforesaid; which are the said several supposed trespasses in the introductory part of this plea mentioned, and whereof the said *AB* hath above thereof complained against him the said *CD*. And this, &c. [*conclude with a verification, as ante, 422. sixth precedent.*]

Under final process.

* 584.

[*First plea, general issue, as ante, 519. Second, as follows.*] And for a further plea in this behalf, as to the breaking and entering the said dwelling-house, in the said first count of the said declaration mentioned, and in which, &c. and making a noise and disturbance therein, and staying and continuing therein making and continuing their said noise and disturbance in the said messuage or dwelling-house of the said *AB*, for the said space of time in that count mentioned, and there seizing and taking the said goods and chattels in the said first count of the said declaration mentioned, and converting and disposing of the same to their own use; and also as to the seizing and taking of the said goods and chattels in the said last count of the said declaration mentioned, and converting and disposing thereof to their own use, above supposed to have been done by the said *CD* and *EF*; they the said *CD* and *EF*, by leave, &c. say, (*actio non, as ante, 422. fourth precedent,*) because

Justification of entry in- to plaintiff's house and seizing his goods under a *feri facias* against him. (c)

The judgment against plaintiff. (d)

(c) See the precedents, 9 Wentw. Index, 98. & 109. And as to the mode of justifying under final process in general, see Com. Dig. Pleader, 3 M. 24. and *ante*, vol. 1. Index, tit. Process.

(d) When the plaintiff in the original action justifies under a *fi. fa. he*

must state the judgment, but the sheriff or his officer need not, and if there be any doubt as to the regularity of the judgment, the latter should plead separately, Com. Dig. Pleader, 3 M. 24. 3 Lev. 20. Stra. 509. 993.

1184. 1 Wils. 17.

Under final process.

* 585

Fieri facias against Plaintiff.

Sheriff's warrant to one of the defendant(s).

Delivery of warrant to such defendant.

Entry and seizure by the two defendants.

they say, that the said *C D*, before the said time, when, &c. in the said first count of the said declaration mentioned, to wit, in — term, &c. (*here state the judgment in debt "or assumpsit and the reference thereto, as in the precedents, ante, 147. 150. observing the notes, and then proceed as follows:*)

And the said *C D* and *E F* further say, that afterwards and before the said time, when, &c. to wit, on, &c. (*state the fieri facias, indorsement to levy, and delivery thereof to one G H or sheriff, as ante, 303 to 304. and then proceed as follows:*) by virtue of which said writ, the said *G H*, esq. so being sheriff of — as aforesaid, afterwards and before the return of the said writ, and before the said time, when, &c. to wit, on the — day of —, in the — year aforesaid, at, &c. aforesaid, made his certain warrant in writing, sealed with the seal of his said office of sheriff of the said county of — as aforesaid, directed to the said *E F*, (he the said *E F* then and at the said time, when, &c. being bailiff of the said sheriff) and by the said warrant the said sheriff then and there commanded him the said *E F*, that of the goods and chattels of the said *A B* in his the said sheriff's bailiwick, he should cause to be made to the said *C D* in the said writ named, as well the said debt of —*l.* which the said *C D* had lately recovered in the said court of our said lord the king, before the king himself, at *Westminster* aforesaid, as also the said sum of —*l.* for his damages, costs and charges aforesaid, so that the said sheriff might have the said sums of money before our said lord the king at *Westminster* aforesaid, (or if in *C. P.* "of the bench aforesaid,") on, &c. (*the return day of the writ,*) to render to the said *C D* for his debt and damages, costs and charges aforesaid; which said warrant afterwards and before the return of the said writ, and before the said time, when, &c. to wit, on the same day and year aforesaid, at, &c. aforesaid, was delivered to the said *E F* so being such bailiff as aforesaid, to be executed in due form of law. ‡ By virtue of which said writ

(e) As to the mode of pleading a original action justifies, the warrant warrant, see *ante*, 539. n. (g). *E. &c.* needs not be stated, but where the amine with the warrant. Where bailiff justifies, it should be stated. only the sheriff or the plaintiff in the

and warrant, the said *E F* so being such bailiff as aforesaid, and the said *C D* as *the servant of the said *E F*, and by his command, afterwards and before the return of the said writ, to wit, at the said time, when, &c. peaceably and quietly entered into the said messuage or dwelling-house, in which, &c. (the outer door thereof being then and there open,) in order to seize and take, and did then and there seize and take in execution the said goods and chattels of the said *A B* in the introductory part of this plea mentioned, the same then and there being in the said messuage or dwelling-house, for the purpose of levying the monies so directed to be levied by the said indorsement, on the said writ as aforesaid, and by the said warrant, and did then and there by sale thereof, levy a certain sum of money, to wit, the sum of —*l.* part and parcel of the debt and damages, costs and charges aforesaid; (*f*) and in so doing, the said *E F* so being such bailiff as aforesaid, and the said *C D* as his servant as aforesaid, did then and there necessarily and unavoidably make a little noise and disturbance in the said messuage or dwelling-house, and stay and continue therein making such noise and disturbance for the said space of time in the said first count of the said declaration mentioned; † as they lawfully might for the cause aforesaid, doing no unnecessary damage to the said *A B* on that occasion; which are the said several supposed trespasses in the introductory part of this plea mentioned, and whereof the said *A B* hath above thereof complained against them the said *C D* and *E F*. And this, &c. [*conclude with a verification, as ante, 422, sixth precedent.*]

Under final process.

* 586

[*This plea is similar to the last as far as the obelisk, omitting in the enumeration of the trespasses what relates *to the seizure of the goods, and stating that the judgment was recovered and*

* 587

Justification of entry in- to plaintiff's house under a *fi. fu.* against another person. (*g*)

(*f*) Where the plea is by the sheriff, the sale of the goods and the return of the writ may be as in the precedent, *post*, 587.

(*g*) See the notes to the last precedent. It frequently happens that under an execution against a debtor, a fraudulent conveyance of his goods

to a third person in whose house they were taken, is set up, and he brings trespass; in this case the justification must be confined as above, to the entry into the house, and the plaintiff's property in the goods disputed under the general issue.

Under final execution issued against "one J K," and at the obelisk insert the following averment:] And the said C D and E F further say, that before and at the said time, when, &c. divers goods, and chattels of the said J K, liable to be taken in execution by the said E F, as such bailiff as aforesaid, under and by virtue of the said writ and warrant, were in the said messuage or dwelling-house, in the said first count of the said declaration mentioned, and that thereupon, under and by virtue of the said writ and warrant, the said E F, &c. [*state the entry into the dwelling-house of plaintiff, and the seizure of the goods of J K therein, as ante, 585. from the obelisk to the end, omitting what relates to the sale of the goods.*]

Justification
by a sheriff
under a *f. fa.*
(h)

[*Same as the precedent, ante, 586. to the † and then proceed as follows:*] And afterwards and before the return thereof, to wit, on the same day and year last aforesaid, at the parish aforesaid, in the county aforesaid, sold the same goods and chattels, and by sale thereof and of certain other goods and chattels of the said A B, made and levied the sum of —l. towards satisfaction of the debt and damages aforesaid, as it was lawful for him to do for the cause aforesaid. And the said C D afterwards and before the return of the said writ, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county of — aforesaid, paid to the said E F, the sum of —l. part of the said sum of money so made by sale of the said goods and chattels as aforesaid, in part satisfaction of the debt and damages aforesaid, and afterwards and at the return of the said writ, to wit, on, * &c. returned the said writ to the said court of our said lord the king, before the king himself at Westminster aforesaid, and then and there returned thereon,

* 588

(h) See the notes to the precedent, ante, 584. Though the above form is given, it does not appear to be necessary in this case to state a return. It is said indeed in 1 Salk. 409. Com. Dig. Pleader, 3 M. 24. 6 T. R. 235. that in justifying under a *f. fa.* the sheriff or other principal officer must shew that the process has been re- turned, but this seems erroneous, for the distinction is between *meeme* and *final process*, and no return of the latter need in general be stated in pleading, 4 Co. 67. a. 5 Co. 90. a. 2 Salk. 700. Ld. Raym. 776. Com. Dig. tit. Return, F. 1. Execution, C. 7.

v^a that, by virtue thereof, he had caused to be levied of the goods *Under final*
 and chattels of the said *A B*, the said sum of —*l.* part whereof, *Process.*
 to wit, the sum of —*l.* he had retained for poundage due on
 the said levy, and that —*l.* residue thereof he had paid to the
 said *E F* in part satisfaction of the debt and damages therein
 mentioned, and that the said *A B* had not any other or more
 goods and chattels in the bailiwick of him the said *C D*
 whereof the said *C D* could cause to be levied the residue of
 the said debt and damages, or any part thereof. Which are, &c..
 [same as the precedent, ante, 586. to the end.]

IN EJECTMENT.

In the King's Bench, (or "C. P." or "Exchequer.")

— Term, 48 Geo. III.

C D
 ats.

John Doe, demise of A B and others.

} And the said *C D* by *General issue.*
E F his attorney, comes
 and defends the force and injury, when, &c. and says, that he
 is not guilty of the said supposed trespasses and ejectment
 above laid to his charge, or of any part thereof, in manner and
 form as the said John Doe hath above thereof complained
 against him, and of this he the said *C D* puts himself upon
 the country, &c.

*REPLICATIONS IN ABATEMENT.

To coverture and non-joinder. In the King's Bench, (or "C. P." or "Exchequer,")
 — Term, 48 Geo. III.

To a plea of coverture, denying the fact. (a) *ag.* } And the said *A B* saith, that his said bill, (or "*the said C D. writ,*") by reason of any thing by the said *C D*, in her said plea above alleged, ought not to be quashed, † because he says, that at the time of exhibiting the said bill, (or "*at the time of the issuing of the said writ,*") against the said *C D*, she the said *C D* was not married to the said *E F*, in the said plea mentioned, in manner and form as the said *C D* hath above in her said plea in that behalf alleged, and this he the said *A B* prays may be inquired of by the country, &c.

To a plea of non-joinder in assumpsit, that the promises were made by the defendant alone. (b) [Commencement as above to the obelisk.] Because he saith, that the said several promises and undertakings were made by the said *C D* alone, in manner and form as the said *A B* hath above thereof complained against him the said *C D*, to wit, at, &c. aforesaid, and not by the said *C D*, jointly and together with the said *E F*, in manner and form as the said *C D* hath above in *his said plea in that behalf alleged, and this he the said *A B* prays may be inquired of by the country, &c.

* 590

To a plea of misnomer, that defendant was known as well by the one name as the other. (c) *ag.* } And the said *A B* saith, that his said bill, (or "*the said C D. writ,*") by reason of any thing by the said *E D*, in his said plea above alleged, ought not to be quashed, because he

(a) See the plea, *ante*, 415. The precedent in *Lil. Ent.* 123. concludes with a formal traverse and verification; but this, according to the general rule of replying in 1 *Saund.* 103. b. n. 3. is unnecessary, and the above form of commencement and conclusion, (inserting the word "*writ*" instead of "*bill*," when the proceedings are in the * common pleas or by original,) will in all cases suffice.

(b) See the plea, *ante*, 415. and the precedents, 1 *Wentw.* 17—33—47. and the note to the last precedent.

(c) See the precedents, *Rast. Ent.* 54. *Thomp. Ent.* 1. 1 *Wentw.* Index.

saith, that the said *E D*, long before and at the time of the exhibiting the said bill, (or "*issuing of the said writ*,") was and still is known as well by the name of *C D* as by the name of *E D*, to wit, at, &c. aforesaid, and this he the said *A B* prays may be inquired of by the country, &c.

To misnomer, &c.

A B } agt. And the said *A B* saith, that the said person against *C D*. } whom he the said *A B* hath exhibited his said bill, by the name of *C D*, ought not to be admitted or received to plead the plea by him above pleaded, for quashing the said bill of the said *A B*; because he saith, that the said person against whom he the said *A B* hath exhibited his said bill, by the name of *C D*, heretofore, to wit, in the term of — last past, came into this court here, and put in bail at the suit of the said *A B*, in the plea aforesaid, by the name of *C D*; as by the record thereof remaining in the said court of our said lord the king, before the king himself at *Westminster* aforesaid, more fully appears; and this he the said *A B* is ready to verify by that record; wherefore he prayeth judgment if the said person, against whom the said *A B* hath exhibited his said bill by the name of *C D*, ought to be admitted or received to his said plea for quashing the said bill, contrary to his own acknowledgment and the said record, &c. and that he may answer over to the said bill.

To a plea of misnomer, estoppel by putting in bail. (d)

And hereupon the said *A B*, inasmuch as he cannot deny the several matters above pleaded by the said *C D*, but admits the same to be true, prays judgment that the said bill ("or *writ*") of him the said *A B* may be quashed, to the intent that he the said *A B* may exhibit a better bill (or "*issue a better writ*") against the said *C D*; therefore it is considered by the court of our said lord the king, before the king himself, (or if in *C. P.* "*of the bench aforesaid*,") now here, that the said bill (or "*writ*") of the said *A B*, be quashed, &c.

Cassette bills vel breve. * 591

(d) As to this replication, see Bac. 1. Tidd's Prac. 3d edit. 582. n. 1. Abr. tit. Pleas, l. 11. Thomp. Ent. 1 Ld. Raym. 249.

*REPLICATIONS IN BAR.

Estoppel.(e) [The replication of matter of estoppel, commences differently from other replications, and is as follows:] "And the said *A B* saith, that the said *C D* ought not to be admitted or received to plead the said plea by him secondly above pleaded, as to so much thereof, wherein he alleges that, &c. (stating the part of the plea to which the estoppel relates,) because he says, that," &c. (here state the ground of estoppel, either by the pleadings and verdict in a former suit, or by a bond, &c. as in the precedents referred to in the note (c), and conclude as follows:) and this he the said *A B* is ready to verify; wherefore he prays judgment if the said *C D* ought to be admitted or received against the said record, (or "against his own acknowledgment by his deed aforesaid,") to plead the plea by him lastly above pleaded in this suit, that, &c. (stating and concluding with the allegation in that part of the plea to which the estoppel relates.)

In the *K. B.* (or "*C. P.*" or "*Exchequer.*")

— Term, 48 Geo. III.

1. Special similitur.(f) *A B* } agt. } And the said *A B*, as to the plea of the said *C D* by *C D*. } him first above pleaded, and whereof he hath put himself upon the country, doth the like.

(e) See the precedents of replications of estoppel, 3 East, 348 to 351. Willes, 10. 1 Saund. 257. 6 T. R. 62. and of rejoinders of estoppel, Carth. 65. 1 Saund. 325. n. 4.

(f) When the defendant pleads only one plea, and concludes to the country, and the issue is immediately made up, the similitur is not framed in this mode, but the words "and

the said *A B* doth the like," are added at the end of the plea with an award of the venire; but when the plaintiff does not wish immediately to proceed to trial, the special similitur is adopted, and when there are several pleas concluding to the country, the special similitur is proper, inserting the words, "secondly," "thirdly," &c. "above pleaded," &c.

*And the said *A B* as to the said plea of the said *C D* by *In general.*
 him secondly above pleaded saith, that he the said *A B* by 2. Comm. a ce-
 reason of any thing by the said *C D* in that plea alleged, ought ment of a re-
 not to be barred from having and maintaining † his aforesaid plication to a
 action thereof against him the said *C D*, because he saith, special plea,
 that, &c. [here state the subject matter of the replication.] usually called
 (s) precludi non.

In the K. B. (or "C. P." or "Exchequer.")

— Term, 48 Geo. III.

A B } And the said *A B* prays a day to imparl to the said *The like, sug-*
v. } *C D*. } pleas, and then to reply to the same, and it is granted gesting the
 to him, &c. and thereupon a day is given to the parties afore- death of one
 said, to come before our said lord the king at *Westminster*, of the defend-
 on, &c. that is to say, for the said *A B* to imparl to the said ants.
 pleas, and then to reply to the same. &c. at which day,
 before our said lord the king at *Westminster*, come as well
 the said *A B* as the said *C D*, by their attorneys aforesaid, and
 the said *E F* cometh not; and hereupon the said *A B* giveth
 the court here to understand, and be informed, that after the
 last continuance of the plea aforesaid, and before this day, to
 wit, on, &c. at, &c. aforesaid, the said *E F* died, and the said
C D survived him, which allegation the said *C D* doth not
 deny, but admits the same to be true; therefore let all proceed-
 ings in this cause against the said *E F* be stayed. And the
 said *A B* as to the said plea of the said *C D* and *E F*, by them
 first above pleaded, and whereof they have put themselves
 upon the country, doth the like. *And the said *A B* as to the
 said second plea, &c. (same as in the last precedent.)

* 594

And this he the said *A B* prays may be inquired of by the 3. Conclusion
 country, &c. to the country.

(s) This is the proper mode of because a replication assuming to
 commencement when the replication answer the whole of the plea, but in
 denies or contains an answer to the fact only answering a part is insuffi-
 whole of the plea, but when the repli- cient, 1 Saund. 28. n. 3. Com. Dig.
 cation contains only an answer to a Pleader, F. 25. Aute, vol. 1. Index,
 part of the plea, it must in the com- tit. Replication.
 mence be qualified accordingly.

In general.

A. Conclusion with a verification in an assumpsit.

And this be the said *A B* is ready to verify: wherefore he prays judgment, and his damages by him sustained on occasion of the non-performance of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, &c.

In assumpsit.

Denial of defendant's inquiry (h)

[*Similiter to general issue, as ante, 592. To second plea, commencement precludi non, as ante, 593. second precedent, to the obelisk.*] Because he saith, that the said *C D*, at the time of the making of his said several promises and undertakings in the said declaration mentioned, was of the full age of twenty-one years, to wit, at, &c. aforesaid, and not within the age of twenty-one years, in manner and form as he the said *C D* hath above in his said second plea in that behalf alleged, and this he the said *A B* prays may be inquired of by the country, &c.

To a plea of infancy, that the meat, &c. were necessities, and that the money mentioned in the sixth count was paid for necessities; and nolle prosequi to counts for money lent, had and received, and account stated. (i)

[*Similiter to general issue, as ante, 592. first precedent.* And as to the said plea of the said *C D*, by him secondly above pleaded, so far as the same relates to the several promises and undertakings, in the said first, second, third, fourth and sixth counts of the said declaration mentioned, the said *A B* saith, that he by reason of any thing by the said *C D* in that plea above alleged, ought not to be barred from having and maintaining his aforesaid action against him, in respect of the premises in those counts respectively mentioned. Because he saith, that the said meat, drink, washing, lodging, and other necessities in the said first and second counts of the said declaration respectively mentioned, to have been found and provided by the said *A B* for the said *C D*, were meat, drink, *washing, lodging, and other necessities suitable to the degree, estate, and condition of the said *C D*, to wit, at, &c. aforesaid, and that the said goods, wares and merchandise, in the said third and fourth counts of the said declaration respectively mentioned to have been sold and delivered by the

* 595

(h) See the precedent, 2 Saund. 96. and Index, 3, 4. And as to this replication in general, ante, vol. 1. Index, tit. Infancy.

(i) See the precedents, 3 Wentw. Index, tit. Infancy.

said *A B* to the said *C D*, were also necessities suitable to *To infancy* the degree, estate, and condition of the said *C D*, to wit, at, &c. aforesaid; and that the money in the said sixth count of the said declaration mentioned to have been paid, laid out and expended by the said *A B* to and for the use and account of the said *C D*, was so paid, laid out and expended by the said *A B*, in and about the purchase of necessities, fit and suitable to the then degree, estate and condition of the said *C D*, to wit, at, &c. aforesaid. And this he the said *A B* is ready to verify; wherefore he prays judgment, and his damages by him sustained, on occasion of the not performing of the said several promises and undertakings in the said first, second, third, fourth and sixth counts of the said declaration mentioned, to be adjudged to him, &c. And as to the said plea of the said *C D*, by him secondly above pleaded, so far as the same relates to the said several promises and undertakings in the said fifth, seventh and last counts of the said declaration mentioned, the said *A B* saith, that he will not further prosecute his suit against the said *C D*, in respect of the said last-mentioned promises and undertakings, or any of them; therefore as to the said last-mentioned promises and undertakings, let the said *C D* be acquitted, and go thereof without day, &c.

Nolle prosequi, as to residue.

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said *C D*, after the making of the said several promises and undertakings in the said declaration mentioned, and before the commencement of this suit, to wit, on the — day of —, *A. D.* —, at — aforesaid, in the county aforesaid, attained his age of *twenty-one years. And the said *A B* further saith, that the said *C D*, after he had so attained his age of twenty-one years, and before the commencement of this suit, to wit, on the — day of —, *A. D.* —, at — aforesaid, in the county aforesaid, assented to, and then and there ratified and confirmed the said several promises and undertakings in the said declaration mentioned. And this, &c. [*conclude with a verification, as ante, 594.*]

Ratification after defendant came of age. (k)

* 596

(k) See the precedents, 3 Wentw. evidence, &c. 98. 101. and see 1 T. R. 648. as to the

To insolvent
debtors' act,
&c.

To a plea of
insolvent debt-
ors' act, admit-
ting the plea.
(c)

And the said *A B*, admitting the truth of the said matters by the said *C D* in his said plea above alleged, prays judgment, and his damages by him sustained on occasion of the non-performance of the said promises and undertakings in the said declaration mentioned, to be adjudged to him according to the form of the statute in such case made and provided; whereupon it is considered by the court here, that the said *A B* ought to recover his damages on occasion of the not performing of the said several promises and undertakings against the said *C D*, to be levied, not on the person of the said *C D*, but on his lands, goods and chattels, according to the form of the statute in such case made and provided. But because it is unknown, &c. [*Award of Inquiry, as in Tidd's Prac. Forms, vol. 3. 260, 261.*]

To tender.

Denial of ten-
der.(m)

[*Similiter to the general issue, as ante, 592. first precedent.*]

And as to the said plea of the said *C D* by him above pleaded as to the said sum of —*l.* parcel, &c. the said *A B* saith, that he by reason of any thing by the said *C D* in that plea above alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, to recover further damages than the said sum of —*l.* parcel, &c. in this behalf. † Because he saith, that the said *C D* did not tender or offer to pay to him the said *A B* the said sum of —*l.* parcel, &c. in manner and form as the said *C D* hath above in his said last-mentioned *plea in that behalf alleged, and this he the said *A B* prays may be inquired of by the country, &c. And as to the said plea of the said *C D*, by him lastly above pleaded, the said *A B* saith, that he by reason of any thing by the said *C D* in that plea above alleged, ought not to be barred from having and maintaining said action thereof against him; because he saith, that he was not indebted to the said *C D*, in manner and form as the said *C D* hath in his said last plea above alleged. And this he the said *A B* also prays may be inquired of by the country, &c.

* 597

Nil debet to
the plea of
set-off.(n)

(l) See the plea, *ante*, 430.

(m) See the plea, *ante*, 431. and

precedents of replications, 3 *Wentw. Index*, 15. &c.

(n) See the plea, *ante*, 433.

[*Similiter to the general issue, as ante, 592. first precedent, To tender.*
and precludi non, as in the last precedent, to the obelisk.] Be-
 cause he saith, that after the making of the said promises and
 undertakings in the said declaration mentioned as to the said
 sum of —l. and before the making of the said tender in the
 said second plea mentioned, to wit, on, &c. (*the teste of the*
writ),^(h) he the said *A B*, for the recovery of his damages by
 him sustained, by reason of the not performing the said several
 promises and undertakings in the said declaration mentioned,
 as to the said sum of —l. parcel, &c. sued and prosecuted out
 of the court of our said lord the king, &c. (*state the issuing of*
the bill of Middlesex, or latitat, or special original, or capias
out of the King's Bench or Common Pleas, as ante, 162. 166,
167. or subpœna in the Exchequer, as 3 Wentw. 179, examin-
ing with the writ actually issued in each particular case.)[†] And
 the said *A B* further saith, that the said precept (or "*writ of*
latitat," &c.) was so sued and prosecuted by him the said *A B*
 against the said *C D* as aforesaid, with intent to implead the
 said *C D*, upon, and for the said several causes of action in
 the said declaration mentioned, as to the said sum of —l. par-
 cel, &c. and to cause him to appear in the said court here,
 and upon his said appearance to declare against him for the
 said several causes of action in the said declaration mentioned,
 as to the said sum of —l. parcel, &c. And the said *A B* fur-
 ther saith, that, according to his said intent, he the said *A B*
 afterwards, to wit, in — term, in the — year of the reign
 of our said lord the king, exhibited his said bill, and declared
 thereon against the said *C D* as aforesaid, to wit, at, &c. afore-
 said. And the said *A B* further saith, that the said *C D* did
 not at any time before the suing forth of the said precept, (or
 "*writ of latitat*," or if several writs be mentioned, "*the said*
first mentioned writ,") tender or offer to pay to the said *A B*

A writ issued
 out of the K.
 B. C. P. or
 Exchequer,
 before the
 tender.^(o)

* 598

(o) See the precedents, 1 Wils. 141. 3 Wentw. 179. and of the re-
 joinder to the above replication, 1
 Wils. 142. In the Common Pleas, the
 plaintiff may reply a capias without an
 original writ first sued out to a plea
 of tender, 2 Saund. 1. in notes; and
 as to this replication in general, id.
 ibid. and page 63. d. to 63. h.
 (p) If the actual day of issuing
 the writ can be readily ascertained,
 it may be advisable to insert it in-
 stead of the teste, in order to pre-
 vent the delay occasioned by a special
 rejoinder, 3 Wentw. 183. in the
 notes, and 1 Wils. 142.

To tender. the said sum of —*l.* parcel, &c. And this be the said *A B* is ready to verify; wherefore he prays judgment, and his full damages which he hath sustained by reason of the non-payment of the said sum of —*l.* parcel, &c. to be adjudged to him, &c.

A writ with continuances.
(*q*)

[*Same as the last precedent to the end of the statements of the writ, at the obelisk, and then proceed as follows:*]

At which day, that is to say, on, &c. (*the return day of the writ,*) in the court of our said lord the king, before the king himself, (*or in C. P. "before the said justices of our said lord the king of the bench,"*) at *Westminster* aforesaid, came the said *A B* by — his attorney, and offered himself against the said *C D* in the plea and bill aforesaid, and the said sheriff of —, to wit,

Return non est inventus.

—, esq. at that day returned to the said court, that the said *C D* was not found in his bailiwick, (*q*) nor did the said *C D* come *or appear in the said court of our said lord the king, before the king himself, (*or in C. P. "before the said justices of the bench,"*) according to the exigency of the said writ.—

* 599

Alias writ.

Whereupon the said *A B* prayed another writ of our said lord the king, to be directed to the sheriff of the said county of —, in form aforesaid, and it was granted to him returnable before our said lord the king at *Westminster* aforesaid, (*or in C. P. "before the justices of our said lord the king of the bench aforesaid,"*) on, &c. (*the first special or general return-day in the ensuing term, depending on the nature of the proceedings whether by original or by bill,*) for the said *C D* to answer to the said *A B* in the plea aforesaid; the same day was given to the said *A B* there, &c. At which day, that is to say, on, &c. (*the return-day last mentioned,*) in the court of our said lord the king, before the king himself, (*or in C. P. "before the justices of our said lord the king of the bench aforesaid,"*) at *Westminster* aforesaid, came the said *A B* by his attorney aforesaid,

(*q*) See the precedent, 3 Wentw. 177. in which, however, the return of the first process is not stated; but according to the replications to a plea of the statute of limitations, where the plaintiff replies more than one

process, the first should be stated to have been returned, see 2 Saund. 68. d. c. Willes, 255. 2 B. & P. 157. and the precedents, and cases there cited: observe the notes to the last precedent.

and offered himself against the said *C D* in the plea aforesaid. And the said sheriff of —, did not send the said last-mentioned writ, nor did he do any thing therein, nor did the said *C D* come or appear in the said court of our said lord the king, before the king himself, (or in *C. P.* "before the said justices of the bench,") according to the exigency of the said last-mentioned writ. Whereupon the said *A B* prayed another writ of our said lord the king, to be directed to the sheriff of the said county of —, in form aforesaid, and it was granted to him returnable before our said lord the king at Westminster, (or in *C. P.* "before the justices of our said lord the king of the bench aforesaid,") on —, for the said *C D* to answer to the said *A B* in the plea aforesaid, the same day was given to the said *A B* there, &c. At which day, (that is to say,) on, &c. in the court of our said lord the king, before the king himself, (or in *C. P.* "before the justices of our said lord the king of the bench aforesaid,") at Westminster aforesaid, came the said *A B* by his attorney aforesaid, and the said *C D* by — his attorney, *also came according to the exigency of the said last-mentioned writ. And the said *A B* offered himself on the 4th day against the said *C D* in the plea aforesaid. As by the record and proceedings thereof remaining in the said court of our said lord the king, before the king himself, (or if in *C. P.* "before the justices of our said lord the king of the bench aforesaid,") more fully and at large appears. And the said *A B* further saith, that the said several writs were respectively so sued and prosecuted by him the said *A B* against the said *C D* as aforesaid, with intent, &c. [same as last precedent from the obelisk, page 597. to the end.]

Another writ.

Appearance of defendant.

* 600

[Similiter to general issue, as ante, 592. To plea of tender, precludi non, as ante, 596. to the obelisk.] Because he saith, that the said *C D* was not always from the time of making the said promises and undertakings in the said declaration mentioned, ready and willing to pay the said sum of —l. parcel, &c. to the said *A B*, in manner and form as the said *C D* hath

A prior demand of the debt.(r)

(r) As to this replication, see 8 N. P. 156. East, 168. 1 Saund. 33. n. 2. Bull.

To tender.

in his said plea above alleged ; but on the contrary thereof the said *A B* saith, that after the making of the said promises and undertakings in the said declaration mentioned, as to the said sum of —*l.* parcel, &c. and after the time when the said causes of action in the said declaration mentioned accrued to the said *A B* in respect thereof, and before the said *C D* did tender and offer to pay the same as in his said plea in that behalf is above alleged, to wit, on, &c. at, &c. aforesaid, he the said *A B* demanded the said sum of —*l.* parcel, &c. of and from the said *C D*, and then and there requested him to pay the same unto him the said *A B*, but the said *C D* did not, nor would, then pay the same or any part thereof unto the said *A B*, but then and there wholly neglected and refused so to do, and then and there unjustly detained the same from him the said *A B*; by reason whereof he the said *A B* then and there sustained damages by reason of the non-payment of the said sum of *—*l.* parcel, &c. in manner and form as he the said *A B* hath above in his said declaration in that behalf alleged, to wit, at, &c. aforesaid. And this he the said *A B* is ready to verify; wherefore he prays judgment and his full damages by him sustained, by reason of the non-payment of the said sum of —*l.* parcel, &c. to be adjudged to him, &c.

* 601

A subsequent demand.(e)

[*Similiter to the general issue, as ante, 592. To plea of tender, precludi non, as ante, 596. to the obelisk.* Because he saith; that after the making of the said tender in the said last plea mentioned, and before the exhibiting of the said bill, to wit, on, &c. at, &c. aforesaid, he the said *A B* demanded of and requested the said *C D* to pay to him the said *A B* the said sum of —*l.* parcel, &c. in the said last plea mentioned, but the said *C D* then and there wholly refused, and hath thence hitherto wholly refused, to pay the same or any part thereof to the said *A B*, to wit, at, &c. aforesaid, and this he the said *A B* is ready to verify; wherefore he prays judgment, and his damages by reason of the non-payment of the said sum of —*l.* to be adjudged to him, &c.

(e) See the precedent, 3 Wentw. 190.

[*Similiter to the general issue, as ante, 592.*] And the said *A B*, inasmuch as he cannot deny but that the said *C D* did tender and offer to pay to him the said *A B* the said sum of —*l.* parcel, &c. in manner and form as the said *C D* hath above in his said last plea in that behalf alleged, freely takes and accepts the same out of court here; therefore, as to the said sum of —*l.* the said *A B* is satisfied; and in order to try the said issue above joined between the parties aforesaid, let a jury thereupon come (or if by original, say, “it is commanded to the sheriff that he cause to come”) before our said lord the king at Westminster, *on, &c. [award of the venire by bill or by original, as in *Tidd's Forms*, 187—189.]

To tender.
Similiter to general issue, admission of tender, and award of venire to try the issue. (f)

* 602

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said *C D* did not deliver (or if a bond were pleaded, say “make and seal and as his act and deed deliver”) to him the said *A B*, the said pipe of wine, (or “the said supposed writing obligatory”) in the said plea mentioned, in full satisfaction and discharge of the said several promises and undertakings in the said declaration mentioned, in manner and form as the said *C D* hath above in his said plea in that behalf alleged, and this he the said *A B* prays may be inquired of by the country, &c.

To plea of record and satisfaction, denial of the delivery of the bond, &c. (u)

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said arbitrator did not make any such award of and concerning the premises, in manner and form as the said

To a plea of arbitrament, denying the award. (x)

(f) This replication is proper when a tender can be proved, and when the plaintiff is prepared to prove more to be due.

(u) See the precedents, 1 Lil. Ent. 105, 106. 3 Wentw. 135. and id. Index, 6. It has been usual to protest the delivery and traverse the acceptance, and this is proper where there has in fact been a delivery but no acceptance in satisfaction; but in other cases the above form seems most correct, though either form will

suffice, Bac. Abr. Accord, C. and Com. Dig. Accord, O. Where a bill or note has in fact been given in payment and is so pleaded, the replication must not traverse the delivery or acceptance in satisfaction, but must state the dishonour of such bill when the same became due, and if the defendant were drawer or indorser, should aver that he had notice thereof.

(x) See the plea, ante, 436. and the precedents of replications, 3 Wentw. 8. Clift. Ent. 195. The re-

To judgment recovered, &c.

C D hath above in his said plea in that behalf alleged, and this he the said *A B* prays may be inquired of by the country, &c.

Nal tiel record, in plea of judgment recovered in same court.

(y)

* 603

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that there is not any record of the said supposed recovery in the said plea mentioned, remaining in the said "court of our said lord the king, before the king himself, (or in *C. P.* "of the bench aforesaid,") at Westminster aforesaid, in manner and form as the said *C D* hath above in his said plea alleged, and this he the said *C D* is ready to verify, when, where and in such manner as the court here shall order direct or appoint,† and because the court of our said lord the king now here, (or in *C. P.* "before the justices of the bench,") will advise themselves upon the inspection and examination of the said record, by the said *C D* in his said plea alleged, a day is given to the parties aforesaid, before our said lord the king, (or in *C. P.* "before the justices of the bench,") at Westminster aforesaid, until — next after —, (or by original, "until —, wheresoever," &c. or in *C. P.* "until —,") to hear the judgment of the said court thereupon, for that the said court of our said lord the king now here, are not yet advised thereof, &c.

The like to a plea of judgment recovered in another court.(z)

[*Same as the last precedent to the obelisk.*] And hereupon the said *C D* is commanded that he have the said record before our said lord the king, (or in *C. P.* "before the justices of the bench") at Westminster, on — next after —, (or by original "on —, wheresoever," &c. or in *C. P.* "on —," and that he fail not at his peril.

To release.

To a plea of release, non est factum.(u)

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said supposed writing of release in the said last

plications usually protest the facts of the plea not immediately denied, but this seems unnecessary, and the replication may at once deny the fact intended to be put in issue, see the general rule, 1 Saund. 103. b.

(y) See the precedents, Tidd's Prac. Forms, 200. 3 Wentw. Index, 12.

(z) See the precedents and the law referred to in the note to the last precedent, ante, 602. n. (y).

(u) See the precedents, 3 Wentw. Index, 12.

plea mentioned, is not the deed of him the said *A B*, and this he the said *A B* prays may be inquired of by the country, &c.

To release.

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said supposed writing of release in the said plea mentioned, was had and obtained from him the *said *A B* by the fraud and covin of the said *C D*, to wit, at, &c. aforesaid. And this, &c. [*conclude with a verification, as ante, 594.*]

To a plea of release, that it was obtained by fraud.

* 604

[*Similiter to the general issue, as ante, 592. and precludi non, as ante, 593. second precedent.*] Because he saith, that he the said *A B* was not, nor is, indebted to the said *C D* in manner and form as the said *C D* hath above in his said last plea in that behalf alleged; and this he the said *A B* prays may be inquired of by the country, &c.

To a plea of set-off, nil debet.

[*Precludi non, as ante, 593. second precedent.*] Because as to so much of the said plea of the said *C D* by him secondly above pleaded, as relates to the said sum of —*l.* therein alleged to be due and owing from the said *A B* to the said *C D*, on the said supposed recognisance in that plea mentioned, the said *A B* saith, that there is not any such record of the said supposed recognisance in the said plea mentioned, remaining of record in the said court of our said lord the king, before the king himself, (or in *C. P.* "of the bench aforesaid,") in manner and form as the said *C D* hath above in his said plea in that behalf alleged, and this he the said *A B* is ready to verify, when, where and in such manner as the court here shall direct and award, [*here insert the time for the production of the record in the same or another court, as in the precedents, ante, 602. and 603. and then proceed as follows:*] And the said *A B* as to the residue of the said plea of the said *C D* saith, that he was not nor is indebted to the said *C D* in the said sum of —*l.* or any part thereof, in manner and form as the said *C D* hath above in that part of his said plea in that behalf alleged, and this he

To a plea of set-off on a recognisance and simple contract, nil record and nil debet. (b)

(b) As to this replication, see 1 East, 869.

To set-off. the said *A B* prays may be inquired of by the country, &c. And the said *C D* doth the like, therefore, &c. [*award of verdict by bill or original as in Tidd's Prac. Forms, 187—189.*]

* 605

Statute of limitations to a plea of set-off.
(c)

*[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said several supposed debts or causes of set-off in the said last plea mentioned, did not, nor did any or either of them arise or accrue to the said *C D* at any time within six years next before the exhibiting of the bill of him the said *A B*, in this suit, (or "*the suing out of the original writ aforesaid,*") in manner and form as the said *C D* hath above in his said last plea in that behalf alleged. And this, &c. [*conclude with a verification, as ante, 594.*]

To a plea of court of conscience act, defendant indebted in more than 40s.(d)

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said *C D*, at the time of the commencement of the said action of him the said *A B*, was indebted to him the said *A B*, upon and by virtue of each and every of the said several promises and undertakings in the said declaration mentioned, in the sum of 40s. and upwards, to wit, in the said sum of —l. in each and every of the said respective counts of the said declaration mentioned, in manner and form as he the said *A B* hath above in his declaration in that behalf complained against the said *C D*, to wit, at, &c. aforesaid, and this he the said *A B* prays may be inquired of by the country, &c.

To statute limitations.

To plea of non assumpsit infra sex annos that defendant did undertake, &c.(e)

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said *C D* did, within six years next before the exhibiting the bill of him the said *A B* in this behalf, undertake and promise in manner and form as he the said *A B* hath

(c) This replication is sufficient, 2 Stra. 1271. but where there are mutual accounts, it will be seldom available, 6 T. R. 189.

(d) See the plea, *ante*, 448. and precedents of replications, 3 Wentw. Index, 18. Com. Dig. County, C. 8.

(e) See the plea, *ante*, 449. If the

time when the process was issued be material, it must be replied specially, as in the case of a tender, *ante*, 597, 598, 599. see the following precedents, and 2 Saund. 1. n. 1. 63. d. e. So if the infancy of the plaintiff, &c. be material, 6 T. R. 193. 2 Saund 127. n. 6.

above thereof complained against him, to wit, at, &c. To statute limitations. aforesaid, and this he the said *A B* prays may be inquired of by the country, &c.

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said several causes of action in the said declaration mentioned, and each and every of them, did accrue to him the said *A B*, within six years before the exhibiting of the said bill of him the said *A B*, (or "*next before the commencement of this suit,*" following the language of the plea,) in manner and form as he the said *A B* hath above complained against the said *C D*, to wit, at, &c. aforesaid, and this he the said *A B* prays may be inquired of by the country, &c.

To plea of action non accrevit infra sex annos, that the cause of action did accrue, &c. (f)

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that within six years next after the said several causes of action in the said declaration mentioned accrued, and each and every of them did accrue to the said *A B*, to wit, on, &c. (here state the issuing of the process out of *K. B. C. P.* or *Exchequer*, and the proceedings thereon, and the purpose for which they were issued, as in the replications to the pleas of tender, ante, 597, and 598. and then proceed as follows:)] And the said *A B* further saith, that the said several causes of action in the said declaration mentioned, and each and every of them, did accrue to the said *A B* within six years next before the issuing of the said first mentioned precept (or "*writ*") out of the said court of our said lord the king here, in manner and form as the said *A B* hath above thereof complained against the said *C D*. And this, &c. [*conclude with a verification, as ante, 594.*]

A writ sued out within six years. (g)

(f) See the note to the last precedent ante, 598, 599. &c. When continued process is pleaded, the first must be

(g) See a precedent of one writ issued, 2 Burr. 951. 1 Wils. 141. 3 Wentw. 203. id. Index, 20. and ante, 597. and of a writ with continuances, Lib. Ent. 32. Thomp. Ent. 151. 3 T. R. 662. 3 Wentw. Index, 20. and general. shewn to have been returned, see ante, 598, 599. &c. and 2 Saund 63. d. c. f. g. 7 T. R. 7. 6 T. R. 617. and 2 B. & P. 137. and 2 Saund. 1. note 1. where see the mode of replying a writ in

To statute limitations.

That plaintiff was abroad, and the action was commenced within six years after his return. (f)

*[*Precludi non, as ante, 593. second precedent.*] Because he saith, that he the said *A B*, at the time when the said several causes of action in the said declaration mentioned, and each and every of them did accrue to him the said *A B*, was in parts beyond the seas, to wit, at, &c. and that he the said *A B*, afterwards, to wit, on, &c. returned from the said parts beyond the seas into this kingdom, and which said return of the said *A B*, was his first return into this kingdom from the said parts beyond the seas, after the accruing of the said causes of action, and every of them to the said *A B*, and that the said *A B* exhibited his said bill against the said *C D*, within six years next after his the said *A B*'s first return into this kingdom from beyond the seas, after the accruing of the said several causes of action aforesaid, or any of them unto the said *A B*. And this, &c. [*conclude with a verification, as ante, 594.*]

That defendant was abroad, and the action was commenced within six years after his return. (k)

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said *C D* before, and at the time when the said several causes of action in the said declaration mentioned accrued to the said *A B*, was in parts beyond the seas, to wit, at —, and that he the said *C D*, afterwards, to wit, on, &c. returned from the said parts beyond the seas into this kingdom; which said return of the said *C D* was his first return into this kingdom from the said parts beyond the seas, after the accruing of the said several causes of action, to wit, at, &c. aforesaid. And the said *A B* further saith, that he the said *A B* exhibited his bill in this cause, and brought his said action thereupon against the said *C D*, *within six years after his the said *C D*'s first return into this kingdom, after the accruing of the said several causes of action, to wit, at, &c. aforesaid. And this, &c. [*conclusion with a verification, as ante, 594.*]

* 608

(f) See the precedent, 3 Wentw. 205. This replication is founded on the 21 Jac. I. c. 16. s. 7. See 2 Saund. 121. a. b. See the notes to the next precedent.

(k) See the precedent, 1 Wentw. 327. This replication is founded upon the 4th Ann. c. 16. s. 19. and not on

the 21st Jac. I. c. 16. See 2 Saund. 121. a. b. If the defendant were in this kingdom at the time the cause of action accrued, this replication will be insufficient, for when once the statute of limitations begins to run, no subsequent disability prevents its operation, 1 Wils. 134. 4 T. R. 310.

The other replications to the statute of limitations may be, that the debts or accounts were due between merchants, in which cases the statute does not affect the remedy, see the precedent, 6 T. R. 193. 2 Saund. 124. 127. n. b. 3 Wils. 79. or the plaintiff's infancy, 2 Saund. 118. Lutw. 243. or that he obtained a judgment which was arrested or reversed, and that he now sues within a year after such reversal, &c. 2 Saund. 63. h. or by an executor, that the testator commenced an action which abated by his death, and that the plaintiff's action was commenced recently after his death, 2 Saund. 64. in notes. 1 Wentw. 257. 3 Wentw. 204, 205. 294.

Other replications to statute of limitations.

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said *C D* at the time of the exhibiting of the said bill of him the said *A B* was, and from thence hitherto hath been, and still is, executor of the last will and testament of the said *E F* deceased, and hath administered divers goods and chattels, which were of the said *E F* deceased, at the time of his death, as executor of the last will and testament of the said *E F*, to wit, at, &c. aforesaid. And this he the said *A B* prays may be inquired of by the country, &c.

To pleas by executors.
That defendant is executor. (1)

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said *C D* on the day of exhibiting the bill of him the said *A B* in this behalf, had divers goods and chattels which were of the said *E F* deceased, at the time of his death, in the hands of him the said *C D* as executor (or "administrator") as aforesaid to be administered, of great value, to wit, of the value of the damages sustained by him the said *A B* by reason of the premises in the said declaration mentioned, † and wherewith the said *C D* as executor (or "administrator") as aforesaid, could, and might, and ought to

To plene administravit, that defendant had assets. (1a)

* 609

(1) See the plea, *ante*, 450. and the precedents of replications, 1 Wentw. 201. 3 Wentw. 211. and 294. East. Ept. 322. b.

(1a) As to this replication, see Com. Dig. Pleader, 2 D. 9. If assets have come to the defendant's hands

since the commencement of the suit, the fact should be replied specially, (6 T. R. 10. 3 Wentw. 324.) see the following precedents. The conclusion to the country is sufficient, 1 Lutw. 101.

Against executor. have, satisfied those damages, and this he the said *A B* prays may be inquired of by the country, &c.

The like to a plea of bonds or judgments outstanding. [Same as the last precedent to the obelisk, and then proceed as follows:] Over and beyond the said goods and chattels in the said last plea admitted to be in the hands of the said *C D* to be administered, and more than sufficient to satisfy and pay the monies due and owing upon and by virtue of the said writings obligatory and judgments in the said last plea mentioned, and wherewith, &c. [conclude as in the last precedent from the obelisk.]

That defendant had assets at the time he had notice of the writ. When the defendant pleads that he had no assets at the time of exhibiting the bill, and in point of fact he had assets at the time he had notice of the action, and before the plaintiff declared unduly paid other debts of equal or inferior degree, without a judgment having been obtained for them, (see *Com. Dig. Administration*, C. 2. *Dyer*, 32. a. 1 *P. Wms.* 295. 3 *P. Wms.* 401.) the plaintiff may reply the issuing of the writ, and the service thereof, on the defendant, and that he then had assets, see the precedents, 3 *Wentw.* 214. 239. but as it appears from *Dyer*, 32. a. and *Com. Dig. Administration*, C. 2. that under the general plea of *plene administravit*, the defendant is not at liberty to give in evidence any payment after notice of the plaintiff's action, this special replication may not be necessary.

* 610

That after the exhibiting of the bill, and before the plea, assets came to defendant's hands. (n)

*[*Precludi non, as ante*, 593. second precedent.] Because he saith, that he exhibited his bill in this suit against the said *C D* as executor as aforesaid, heretofore, that is to say, upon, &c. and that after the exhibiting the said bill, and before the time of pleading the said plea of the said *C D*, to wit, on, &c. aforesaid, and on divers other days and times between that day and the day of pleading the said plea, divers goods and chat-

(n) See another precedent, 3 *Saund.* 336. a. 2 *Saund.* 216. n. 1. *Wentw.* 224, 225. and the opinion 219. n. 2. and see the form of the therein given, and the observations judgment, 1 *Saund.* 336. a. of Ashhurst, J. 6 *T. R.* 10, 11. 1

tels which were of the said *E F* at the time of his death, of great value, (to wit,) of the value of the said damages in the said declaration mentioned, came to, and were in the hands of the said *C D* as executor as aforesaid, to be administered, to wit, at, &c. aforesaid, and wherewith he could, and might and ought, to have satisfied the damages aforesaid; and this he the said *A B* is ready to verify; wherefore he prays judgment, and his damages aforesaid, to be levied of the said goods and chattels, which were of the said *E F* at the time of his death, which have so come to the hands of the said *C D* as executor as aforesaid to be administered, since the exhibiting of the bill aforesaid, &c.

Against executors.

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said judgment in the said first plea mentioned to have been recovered against the said *C D* by the said *E F*, was had and obtained by the fraud and covin of the said *C D*, and with his intent to defraud the said *A B* of his debt. And the said *A B* further saith, that the said judgment in the said first plea mentioned to have been recovered against the said *C D* by the said *G H*, was had and obtained by the fraud and covin of the said *C D*, and with his intent to defraud the said *A B* of his said debt. And this, &c. [*conclude with a verification, as ante, 594.*]

To plea of judgments recovered against executor, that they were obtained by fraud. (o)

* 611.

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said *E F* in his life-time, and at the time of his death, was indebted to the said *G H* in a much less sum of

To plea of judgment recovered against executor, that he fraudulently suffered the judgment to be obtained against him for more than was due. (p)

(o) See the precedents, 1 Lutw. 660. 2 Saund. 49. As to this replication in general, see Com. Dig. Pleading, 2 D. 9. 5 T. R. 80. It is sufficient to allege generally, that the judgment was obtained or continued by covin, without shewing the special matter, and that it was by the covin of the executor or administrator only, 9 Co. 110. If several judgments be pleaded, the plaintiff may

in his replication answer one only, or every judgment separately, 2 Saund. 48, 49. 1 Saund. 334, 335. 337. b. n. 2.

(p) See the note to the last precedent. When any thing was due at the time the judgment was obtained, but it was confessed fraudulently for too large a sum, this replication is proper, 5 T. R. 82.

*Against ex-
ecutors.*

money than the said sum of —l. to wit, in the sum of —l. only, and no more, to wit, at, &c. aforesaid, and that the said *C D* permitted and suffered the said judgment in the said plea mentioned, to pass against him the said *C D* for much more, to wit, for the sum of —l. more than was due and owing from the said *E F* in his life-time and at the time of his death to the said *G H*, by the fraud and covin of the said *C D*, and the said *G H* in order to cover and protect the goods and chattels which were of the said *E F* at the time of his death, which had, or might come to the hands of the said *C D* to be administered, from the payment and discharge of the damages sustained by the said *A B*, by reason of the non-performance of the said several promises and undertakings in the said declaration mentioned, and to prevent the said *A B* from recovering his damages aforesaid. And the said *A B* further saith, that the said *C D* now hath, and at the time of the commencement of this suit had, divers goods and chattels which were of the said *E F* deceased, at the time of his death in his hands to be administered, sufficient to satisfy all the money really due and owing from the said *E F* at the time of his death to the said *G H* and the damages aforesaid, by the judgment aforesaid, in form aforesaid recovered, and also the damages sustained by the said *A B*, by reason of the non-performance of the said *several promises and undertakings in the said declaration mentioned, to wit, at, &c. aforesaid. And this, &c. [*conclude with a verification, as ante, 594.*]

* 612

To plea of
bond out-
standing, that
it has been
paid, and is
fraudulently
kept on foot.
(*q*)

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that after the making of the said writing obligatory in the said plea mentioned, and before the pleading of the said plea, to wit, on, &c. the said writing obligatory to the said *G H*, and all money thereon due and payable, was fully paid off, discharged and satisfied, to him the said *G H*, to wit, at, &c. aforesaid. And the said *A B* in fact further saith, that notwithstanding such payment and discharge of the said writing

(*q*) See the precedent, 3 Wentw. 1 Saund. 333 to 336. and the law and 243, 244. and other more special the precedents referred to, id. 334. forms, Lil. Ent. 58. Bro. Red. 56. n. 9.

obligatory to the said *G H* as aforesaid, the said writing obligatory is still kept on foot, uncanceled by the fraud and covin of the said *C D*, with intent to defraud him the said *A B* of the damages by him sustained on occasion of the premises in the said declaration mentioned. And this, &c. [*conclude with a verification, as ante, 594.*]

Against executors.

[*If the defendant have pleaded the general issue as well as plene administravit, and the plaintiff is not certain of being able to prove that the defendant has received assets, he should not take issue on the latter plea, but should reply as follows, upon which the defendant usually withdraws the general issue, or will have to pay the costs of the trial, in case the plaintiff obtain a verdict :*] And the said *A B* as to the said plea of the said *C D* by him first above pleaded, and whereof he hath put himself upon the country, doth the like. And as to the said plea of the said *C D* by him lastly above pleaded, the said *A B*, inasmuch as he cannot deny the said several allegations of the said *C D* in his said last plea, prays judgment, and his damages by him sustained on occasion of the not performing *of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him to be levied of the goods and chattels which were of the said *G H* at the time of his death, and which, since the pleading of the said second plea of the said *C D*, have come,^(s) or which shall hereafter come, to the hands of the said *C D* as executor, (or “as administrator,”) as aforesaid, to be administered, (or if the plea were of bonds, &c. outstanding, and plene administravit præter, here add the following words “after satisfying the monies due and owing on the said several judgments and writings obligatory, in the said last plea mentioned.”) But because it is uncertain whether the said *C D* will be convicted upon the said issue above joined between the parties aforesaid, therefore let judgment be thereupon staid until the trial and determination of the said issue, and in order to try the said issue, let a jury come, &c.

Similiter to general issue, and to plea of plene administravit prayer of judgment of assets, quando acciderint. (r)

* 613

(r) As to this replication, Com. (s) See 6 T. R. 10. 1 Saund. 336, s. Dig. Pleader, 2 D. 9.

Against ex- (award of venire by bill or original, as in Tidd's Forms, 187
cutors. —189.)

The like with
 award of in-
 quiry, where
 the general
 issue was not
 pleaded.

And hereupon the said *A B*, inasmuch as the said *C D* hath not denied the said action of him the said *A B*, nor but that the said *E F* in his life-time did undertake and promise, in manner and form as he the said *A B* hath above in that behalf alleged, and inasmuch as he the said *A B* cannot deny but that the said *C D* had not any goods or chattels which were of the said *E F* at the time of his death, in his hands to be administered, in manner and form as the said *C D* hath above in his said plea in that behalf alleged, prays judgment, and his damages by him sustained, on occasion of the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, to be levied of the goods and chattels which were of the said *E F* at the time of his death, and which since the pleading of the said second plea of the said *C D* have come, or which shall hereafter come, to the hands of the said *C D* to be administered, (or if the plea were of bonds, *&c.* outstanding, and *plene administravit præter*, here add the following words—"after satisfying the monies due and owing on the said several judgments and writings obligatory in the said last plea mentioned.") Therefore it is considered that the said *A B* do recover against the said *C D*, his damages by him sustained on occasion of the premises, to be levied in form aforesaid, but because it is unknown to the court of our said lord the king now here, what damages the said *A B* hath sustained by means of the premises, the sheriff is commanded, &c. [*award of inquiry as usual in case of a judgment by nil dicit, see Tidd's Forms, 260.*]

*REPLICATIONS IN DEBT.

[*The common similiter in debt, to a plea concluding to the country, is the same as in the precedent in assumpsit, ante, 592. When the replication concludes with a verification otherwise than of matter of record, the form is as follows :*] And this he the said *A B* is ready to verify; wherefore he prays judgment and his debt aforesaid, together with his damages by him sustained on occasion of the detention thereof to be adjudged to him, &c.

On bonds, &c.
Common conclusion with a verification.

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said writing obligatory in the said declaration mentioned, was obtained fairly and honestly by him the said *A B*, and not by him the said *A B* and others in collusion with him, by fraud, covin, or misrepresentation, in manner and form as the said *C D* hath in his said plea by him lastly above pleaded, alleged, and this he the said *A B* prays may be inquired of by the country, &c.

To plea that deed was obtained by fraud, that it was duly obtained. (u)

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said *C D* of his own free will, made and sealed, and as his act and deed, delivered to the said *A B*, the said writing obligatory in the said declaration mentioned, and not by reason, or in consequence of the said supposed menaces or threats, in the said second plea mentioned, or in fear or apprehension thereof, in manner and form as the said *C D* hath in his said second plea in that behalf alleged, and *this he the said *A B* prays may be inquired of by the country, &c.

To plea that deed was obtained by menaces, that defendant freely executed it. (b)

* 616

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said *C D* at the time of the making of the said

To plea of infancy, that defendant was of age. (c)

(a) See the plea, *ante*, 464.

596. and Com. Dig. Pleader, 2 W. 19, 20.

(b) See the plea of menace, *ante*, 464. The replications to the other pleas, *ante*, 465, 466. will nearly resemble the above precedent, see the forms in 7 Wentw. 397. 590 to

(c) See the plea, *ante*, 466. and the precedents, Rast. Ent. 163. a. 7 Wentw. 577, 578. Com. Dig. Pleader, 2 W. 22. and the replications in *assumpsit*, *ante*, 596 to 602.

On bonds, &c. writing obligatory in the said declaration mentioned, was of the full age of twenty-one years, and not within age, in manner and form as he the said *C D* hath above in his said plea alleged, and this he the said *A B* prays may be inquired of by the country, &c.

To plea of usury or other illegality, that the bond was given upon a legal contract.
(d)

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said writing obligatory in the said declaration mentioned, was made by the said *C D*, for a good and legal consideration, and not in pursuance of or upon the said corrupt and unlawful agreement, or for the purpose in the said plea of the said *C D* mentioned, in manner and form as the said *C D* hath above in his said second plea in that behalf alleged, and this he the said *A B* prays may be inquired of by the country, &c.

To a plea of tender.(e)

[*Similiter to general issue, as ante, 592. Replication to plea of tender as follows.*] And the said *A B*, as to the said plea of the said *C D* by him above pleaded, as to the said sum of —*l.* residue of the said sum of —*l.* above demanded, saith, that he the said *A B* ought not, by reason of any thing by the said *C D* in that plea alleged, to be barred from having and maintaining his aforesaid action against the said *C D*, to recover damages by reason of the non-payment of the said sum of —*l.* because he saith, that, &c. [*here state the subject matter of the replication, as in the precedents in assumpsit, ante, 596 to 602. using the words "after the said causes of action in the said declaration mentioned, accrued to the said A B as to the said sum of —l." instead of the words "after the making of the said promises and undertakings in the said declaration mentioned," and then conclude as follows.*] And this he the said *A B* is ready to verify; wherefore he prays judgment, and his damages by

* 617

(d) See the plea, *ante*, 467. and traverse and verification, but see 2 the precedents, 1 Brown. Ent. 188. T. R. 439. and 1 Saund. 103. h. n. 3. 2 T. R. 439. 3 T. R. 426. 7 Wentw. (e) See the plea, *ante*, 469. and the precedents, 7 Wentw. 577. 580. 589. 584.
tit. Pleader, 2 W. 23. Some of the precedents conclude with a formal

reason of the non-payment of the said sum of —l. to be adjudged to him, &c. *On bonds, &c.*

The replication to a plea of set-off to debt on simple contract, when it concludes to the country, is precisely similar to that in *assumpsit*, *ante*, 604. &c. Where the set-off is to debt on bond, the replication may either deny the subject matter of the defendant's set-off, or allege that more was due on the defendant's bond than the sum mentioned in the plea, see 3 *T. R.* 65. If the replication conclude with a verification, such conclusion will be as *ante*, 615.]

To a plea of set-off.

And because the said *A B* doth not deny the said plea of the said *C D*, but admits the same to be true, therefore let the plea of the said *A B* and all proceedings thereon, be staid until the full age of the said *C D*, &c.

To parol demurrer, confession of plea. (f)

[*Precludi non*, as *ante*, 593. *second precedent*.] Because he saith, that the said *C D* hath, and at the time of the exhibiting of the said bill of him the said *A B*, (*or if in C. P. or by original*, "at the time of the commencement of this suit,") had, sufficient lands, tenements, and hereditaments by descent from his said father, (*or brother, &c. according to the fact*,) in fee-simple, wherewith the said *C D* could, and might, and ought, to have satisfied the said debt of the said *A B* above demanded, and this he the said *A B* prays may be inquired of by the country, &c.

To plea of *rien per descent*, that defendant had assets at time of commencement of suit. (g)

* 618

[*Precludi non*, as *ante*, 593. *second precedent*.] Because, according to the form of the statute in such case made and

To plea of *rien per descent*, that defendant had assets before the commencement of the suit. (h)

(f) See the plea, *ante*, 472.

(g) See the plea, *ante*, 473. 2 *Mod. Ent.* 227, 228. and 7 *Wentw.* 603, 604, 605. If the defendant had not assets at the time of exhibiting the bill, but had them at the time the writ issued, the issuing of the writ should be replied specially, as *ante*, 606. and under the 3d and 4th *William and Mary*, c. 14. if the heir

plead *rien per descent*, the plaintiff may reply that he had assets between the death of his ancestor, and before the commencement of the suit as in the next precedent, see *Bac. Abr.* Heir and Ancestor, F.

(h) See the precedent, 5 *Wentw.* 373. and the note to the last precedent.

On bonds, &c. provided, he saith, that the said *C D* after the death of the said *E F* his father, and before the day of obtaining the original writ of the said *A B* against him the said *C D* in this behalf, to wit, on, &c. had divers lands and tenements, by descent from his father to wit, at, &c. aforesaid. And this, &c. [conclude with a verification, as ante, 615.]

To plea of solvit ad diem, or post diem, denying the payments. (i)

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said *C D* did not pay to him the said *A B* the said sum of —l. in the said condition mentioned, with lawful interest for the same, in manner and form as the said *C D* hath above in his said plea in that behalf alleged, and this he the said *A B* prays may be inquired of by the country, &c.

To plea that no memorial containing the names of the witnesses was enrolled, setting out the memorial, &c. (k)

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that a memorial of the said writing obligatory in the said declaration mentioned, was within twenty days of the execution thereof, to wit, on, &c. duly enrolled in the high court of chancery, (the said court then, and still being holden at *Westminster*, in the county of *Middlesex*.) in pursuance of the statute in that case made and provided, and which said memorial is as *follows, to wit : (*here copy the memorial verbatim* :) as by the said memorial now remaining duly enrolled in the said high court of chancery at *Westminster* aforesaid, more fully appears ; and the said *A B* further saith, that the said memorial did duly contain the day of the month and the year when the said writing obligatory in the said declaration mentioned bore date, and the names of all the parties, and for whom any of them were trustees, and of all the witnesses, and did truly set forth the annual sum or sums to be paid, and the name of the person and persons for whose life or lives the said annuity was granted, and the consideration and considerations of granting the same in manner and form as in and by the statute in that case made and provided is required ; as by the said enrol-

* 619

(i) See the pleas 473, 474.

(k) See the plea, ante, 474, 475.

and the replication in 4 T. R. 585. 2 H. Bl. 261. This concluded with a

verification, by the record, but other MS. precedents conclude with a verification and prayer of judgment.

ment of the said memorial remaining of record in the said court of chancery at Westminster aforesaid more fully appears; and this be the said *A B* is ready to verify by the said record, when, where, and in such manner as the court here shall order and direct.

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said *E F* and *G H*, the said arbitrators in the said condition of the said writing obligatory mentioned, after the making of the said writing obligatory, and within the time limited and appointed by the said condition for the making of their award of and concerning the premises, that is to say, on, &c. at, &c. aforesaid, having taken upon themselves the burthen of the said arbitrament, did in due manner make their award in writing under their hands of and concerning the premises in the said condition mentioned, and thereby referred to them by the said *A B* and *C D*, ready to be delivered to the said parties in difference, or such of them as should require the same, by which said award they the said *E F* and *G H*, the arbitrators aforesaid, did then and there award and order, &c. (*here set forth the whole award verbatim in the past tense.*) (m) Of which said award the said *C D* afterwards, to wit, on the said, &c. at, &c. aforesaid had notice. Nevertheless the said *A B* in fact saith, that the said *C D* did not, &c. (*here state the defendant's breach of the award, according to the facts of the particular case, and which may be as in the declaration, ante, 146. and if there have been several breaches of the award, state the second or other breach as follows:*) And for assigning a further breach of the said award according to the form of the statute in that case made and provided, the said *A B* in fact further saith, that, &c. (*here state the other breach and conclude as follows:*) And this be the said *A B* is ready to verify;

To plea that no award was made, stating the award and breaches (l)

* 620

Breaches of the award. (n)

(l) See the plea, *ante*, 476. and the precedents of replication of an award and breach, 1 Saund. 165, 166. 2 Saund. 184, 185. 2 Wils. 267. 7 Wentw. 527 to 530. and of an umpirage, 1 Saund. 68.

(m) The whole award must be stated, 2 Saund. 62. b. n. 5.

(n) A breach must be stated though the defendant pleaded no award, and could not traverse the breach; this is an anomalous case, 1 Saund. 103. n. 1. n. 4. 317.

On bonds, &c. wherefore he prays judgment and his debt aforesaid, together with his damages by reason of the detention thereof to be adjudged to him, &c.

To plea of ease and favour to debt on bail-bond, that bond was duly executed. (p)

[*Precludi non, as ante 593. second precedent.*] Because he saith, that the said *CD*, as bail or surety for the said *EF*, before the return of the said writ in the said declaration mentioned, and on the day of the date of the said writing obligatory, to wit, on, &c. at, &c. aforesaid, sealed, and as his act and deed delivered, the said writing obligatory in the said declaration mentioned, and in manner and form as the said *AB* hath in his said declaration alleged, and not after the return of the said writ in the said declaration mentioned, in manner and form as the said *CD* hath above in his said plea alleged, and this he the said *AB* prays may be inquired of by the country, &c.

* 621

To plea of non damnificatus to debt on bastardy bond, stating that the parishioners were damnified. (p)

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said *EF* in the said condition mentioned, at the time of making the said writing obligatory, was pregnant with a certain child, whereof the said *CD* was the reputed father, and that she the said *EF*, after the making of the said writing obligatory, and before the commencement of this suit, to wit, on, &c. at, &c. aforesaid, was delivered of the said child, who was then and there born a bastard, in the said parish of —, and that neither the said *CD* nor any person on his behalf, for a long space of time after the birth of the said child, to wit, from the time of the said birth of the said child until the commencement of this suit, did provide any food or nourishment for the said child; by reason whereof the inhabitants and parishioners of the said parish of —, during the time aforesaid, lest the said child should perish for want of necessary food,

(o) See the plea, *ante*, 478. and the replication and note, 5 Wentw. 468. and see the precedents, 1 Saund. 159. 18. 7 Wentw. 613, 614. Com. Dig. Pleader, 2 W. 25. The ease and favour is in general the most material traverse, 1 Saund. 163. n. 2. Most of the precedents conclude with a formal traverse and verification,

but this seems unnecessary, see 5 Wentw. 482, 483. 468. 1 Saund. 103. a. b.

(p) See the plea and notes, *ante*, 480. and the precedents of replications, 2 Saund. 82. 7 Wentw. 615, 616. and the assignment of breaches, *ante*, 154, 155.

and nurture, were forced and obliged to expend and did necessarily expend a large sum of money, to wit, the sum of —*l.* of lawful money of *Great Britain*, for, in, and about the procuring necessary food and nourishment for the said child, to wit, at, &c. aforesaid; and so the said *A B* saith, that the said inhabitants and parishioners of the said parish of —, were and are damaged by reason and on account of the maintenance and bringing up of the said child, within the true intent and meaning of the said condition of the said writing obligatory, to wit, at, &c. aforesaid. [*conclude with a verification, as ante, 615.*]

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said *C D* did not, nor would, well and *truly pay or cause to be paid unto the said *E F*, his executors administrators or assigns, the said sum of —*l.* and the interest thereof on the days and times and in the manner limited and appointed in and by the said condition of the said writing obligatory so made and executed to the said *E F* as aforesaid, and according to the true intent and meaning thereof, but wholly neglected and refused so to do, to wit, at, &c. aforesaid, whereupon and whereby the said *A B* afterwards, to wit, on, &c. at, &c. aforesaid, was called upon, and forced and obliged to pay, and did then and there pay to the said *E F* the said sum of —*l.* and the interest thereof, together with the costs of a certain action before then brought by the said *E F* against him the said *A B* for the recovery thereof, amounting in the whole to a large sum of money, to wit, the sum of —*l.* of lawful money of *Great Britain*, and thereby he the said *A B* was and is damaged to the amount thereof, by reason and means of the said in part recited obligation and the condition thereof, to wit, at, &c. aforesaid. And this, &c. [*conclude with a verification, as ante, 615.*]

To plea of non-damificatus to debt on bond to indemnify plaintiff against a surety bond, stating how plaintiff was damaged. (q)

* 622

(q) See the plea, *ante*, 481. and the precedents, 1 Saund. 115. 7 Wentw. 616 to 621. and on a sheriff's bond, 1 East, 385. The above was the replication in *Holmes v. Rhodes*, 1 B. & P. 631. and was specially demurred to, because it did not state in what court the plaintiff was sued, and what sums he was obliged to pay for interest and costs distinctly, but the plaintiff had judgment on a defect in the plea. As to this objection, see 1 Saund. 117. n. 5. 1 Lev. 195.

On bonds, &c.

To plea of performance to debt on bond conditioned for *E F*'s duly accounting as a clerk, that *E F* received monies which he has not accounted for.

(r)

* 623

[*Procludi non, as ante, 593. second precedent.*] Because he saith, that the said *E F* remained and continued in the service and employment of the said *A B* as such clerk as in the said condition of the said writing obligatory mentioned, for a long space of time, to wit, from the day and year aforesaid, "until and upon the — day of —, *A. D.* —; and that during the said time, that he the said *E F* so remained and continued in the said service and employment of the said *A B* as such clerk as aforesaid, to wit, on, &c. and on divers other days and times, between that day and the said day of —, *A. D.* —, to wit, at, &c. aforesaid; he the said *E F* as such clerk as aforesaid, had and received for and on the account of the said *A B*, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of —*l.* of lawful money of *Great Britain*. Yet the said *G H*, although often requested so to do, hath not yet accounted for or paid the same or any part thereof to the said *A B*, but hath therein wholly failed and made default; and the said sum of money so had and received by the said *E F* as aforesaid, is still wholly unpaid and unsatisfied to the said *A B*, contrary to the form and effect of the said condition of the said writing obligatory, to wit, at, &c. aforesaid. And this, &c. [*conclude with a verification, (s) as ante, 615.*]

The like stating several breaches. (s)

[*Same as the last precedent to the end of the verification, and then state the second breach as follows:*] And for assigning a further breach of the said condition of the said writing obligatory, according to the form of the statute in that case made and provided, the said *A B* saith that after the making of the said writing obligatory, and whilst the said *E F* remained and continued in the said service and employ of the said *A B*, as such clerk as aforesaid, to wit, on, &c. at, &c. aforesaid, [*state*

(r) See the pleas of performance, sheriff's bond, *Cowp.* 575. 1 *East, ante*, 481 to 486. and the precedents 385.

of replications and the law, 8 *T. R.* 459, 460. 1 *B. & P.* 640, 641. 2 *East*, 507. 1 *Saund.* 101. 2 *Saund.* 101, 102.

New Rep. 176, 177. 3 *East*, 485. 6 *East*, 507. 1 *Saund.* 101. 2 *Saund.* 101, 102. 3 *Wils.* 385. 7 *Wentw.* 537. 1 *Saund.* 58. n. 1. 2 *Saund.* 187. n. 2.

605. 616. Special statements of 2. *Ante*, 154. 156.

breaches, 1 *Saund.* 55, 56. 316. On

the breach according to the fact, and conclude with a verification, On leases, &c. as in the last precedent.]

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said *E P* did not before the said rent became due, *eject, expel, put out or amove the said *A B* from the possession of the said demised premises, or any part thereof in manner and form as the said *A B* hath above in his said plea in that behalf alleged; and this he the said *A B* prays may be inquired of by the country, &c.

Denial of the oricion. (u)

* 624

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that he the said *A B* did not accept or receive of and from the said *G H*, the said rent in the said plea mentioned, or any part thereof, or accept the said *G H* as his tenant of the said demised premises with the appurtenances, in manner and form as the said *C D* hath in his said plea in that behalf alleged; and this he the said *A B* prays may be inquired of by the country, &c.

To plea by lessee that plaintiff accepted an assignee as tenant, traverse of the acceptance. (x)

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that there is such a record of the said recognisance, (or if a judgment, say "recovery,") remaining in the said court of our said lord the king, before the king himself, (or in *C. P.* "of the bench aforesaid,") as he the said *A B* hath above in his said declaration in that behalf alleged; (z) and this he the said *A B* is ready to verify by the said record, when, where and in such manner as the court here shall direct and award, and he prays that the said record may be inspected and seen by the said court here, and because the said court are not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid, before our said

To a plea of null record in the same court stating the record. (y)

(u) See the plea, *ante*, 486. 2 Saund. 92, 93. Tidd's Forms, 200. Saund. 176, 177. Com. Dig. Pleader, 2 W. 13.

(x) See the plea, *ante*, 487.

(y) See the plea, *ante*, 488. and the precedents of replications, 7 Wentw. 68. 2 Rich. C. P. 218. 1 others do not, see 2 Rich. C. P. 218. 7 Wentw. 68.

(z) Some of the precedents here refer to the term and roll, see Tidd's Forms, 200. 1 Saund. 92, 93. But

On records.

lord the king at *Westminster*, until —, to hear the judgment of the said court thereupon, for that the said court of our said lord the king now here, are not yet advised thereof, &c.

* 625

The like in
a different
court. (a)

*[*Precludi non, as ante, 593. second precedent.*] Because he saith, that there is such record of the said recognisance (or if a judgment "recovery,") remaining in the said court of our said lord the king, before the king himself, (or "of the bench aforesaid,") as he the said *A B* hath above in his said declaration in that behalf alleged; and this he the said *A B* is ready to verify by the said record, and he prays that the said record may be seen and inspected by the court here; and because the said *A B* hath not the said record now ready here in court, he is commanded to have the same here, on, &c. (or by original, "on," &c. "wheresoever," &c.) and that he fail not at his peril, the same day is given to the said *C D* here, &c.

On recogni-
sances.

To plea of no
ca. sa. against
principal, set-
ting out ca. sa.
(b)

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that he the said *A B* after the recovery of the said judgment against the said *E F*, as in the said declaration is mentioned, and before the commencement of this suit, to wit, on the — day of —, in the — year of the reign of our said lord the king, sued and prosecuted out of the court of our said lord the king, before the king himself, the said court then and still being holden at *Westminster*, in the county of *Middlesex* aforesaid, a certain writ of our said lord the king, called a *capias ad satisfaciendum*, upon the said judgment against the said *E F*, directed to the sheriff of —, being the county in which the *venue* in the said action against the said *E F* was laid, by which said writ, our said lord the king commanded the said sheriff of —, that he should take the said *E F*, if he should be found in his bailiwick, and him safely keep, so that he might have his body before our said lord the king, at

(a) See the precedents, 7 Wentw. the precedents of replications, 7 114. 1 Saund. 92, 93. Tidd's Forms, Wentw. 69. and Index, 631. Cift. 200. 185.

(b) See the plea, *ante*, 439. and

Westminster, on —, to satisfy the said *A B* —*l.* for his damages, which he had sustained, as well by reason of the not performing *certain promises and undertakings then lately made to the said *A B* by the said *E F*, as for his costs and charges by him about this suit in that behalf expended; whereof the said *E F* was convicted as appeared to our said lord the king of record, and that the said sheriff should have there that writ. Which said writ afterwards, and before the said return thereof, to wit, on, &c. at, &c. aforesaid, was delivered by the said *A B* to —, esq. who then and there, and from and thenceforth, until, and at, and after the return of the said writ, was sheriff of — aforesaid, to be executed in due form of law. At which day, to wit, on, &c. (*the return day of the writ,*) before our said lord the king at *Westminster*, came the said *A B* in his own proper person, and the sheriff, to wit, —, esq. on that day returned to the said court of our said lord the king, at *Westminster* aforesaid, on the said writ, that the said *C D* was not found in his bailiwick. As by the said writ of *captas ad satisfaciendum*, and the return thereof duly affiled, and remaining of record, in the said court of our said lord the king, before the king himself, more fully appears. And this he the said *A B* is ready to verify by the said record; wherefore he prays judgment, and his debt aforesaid, together with his damages by him sustained, on occasion of the detaining thereof to be adjudged to him, &c.(c)

On recogni-
tances.

* 626

[*Præcludi non, as ante, 593. second precedent.*] Because he saith, that after the recovery of the said judgment against the said *E F*, and before the exhibiting of the said bill of the said *A B* in this behalf, (*or in C. P. "before the commencement of this suit,"*) to wit, on the — day of —, in the 47th year of the reign of our lord the now king, he the said *A B* sued and prosecuted, &c. (*state the issuing of the ca. sa. and the sheriff's return of non est inventus, and the reference to the writ and return as in the last precedent.*) And the said *A B*

To plea of
death of prin-
cipal before
return of ca.
sa. stating a
ca. sa. and re-
turn, and that
the principal
was then li-
ving.(d)

* 627

(c) This replication must conclude precedents of replications, 2 East, with a verification, 2 T. R. 576. 312. Clift. 188. 7 Wentw. Index.
(d) See the plea, *ante*, 489. and the 631.

*On judgments
and statutes.*

further saith, that the said *E F* at the time of the issuing of the said writ of *capias ad satisfaciendum*, and at the return thereof, was living, to wit, at *Westminster* aforesaid, in the county aforesaid. And this, &c. [*conclude with a verification, as ante, 615.*]

*To pleas to
debt on judg-
ment.*

[See the pleas, *ante*, 489, 490. and replications, 7 *Wentw. Index*, 632. The replications to the plea of *nul tiel record*, are precisely as *ante*, 624, 625.]

*To plea of
compromise
by rule of
court, that it
was obtained
by fraud.(f)*

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said writ of *latitat* in the said second plea mentioned, was sued out, and the said rule of the said court and recovery in that plea mentioned, were had and obtained by fraud and covin, contrary to the form of the statute in such case made and provided. And this, &c. [*conclude with a verification, as ante, 615.*]

*To plea of
former convic-
tion, that it
was obtained
by fraud.(g)*

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said judgment of conviction in the said plea to the said first count of the said declaration mentioned, was had and obtained by fraud and covin. And this, &c. [*conclude with a verification, as ante, 615.*]

(f) See the plea, *ante*, 492. and the precedents, 7 *Wentw. Index*, 632. and 4 *Hen. VII. c. 20. Bac. Abr. Actions, qui tam, D.* (g) See the plea, *ante*, 493. and the last note.

REPLICATIONS IN COVENANT.

[*Precludi non, as ante, 593. second precedent.*] Because he saith, that the said *C D* of his own wrong, and without the leave or license of him the said *A B*, to him the said *C D*, for that purpose first given and granted, did plough and break up, &c. (*enumerate the acts complained of as in *the declaration.*) * 628 And this he the said *A B* prays may be inquired of by the country, &c.

To plea of license, denying the license. (h)

As the pleas in covenant most frequently conclude to the country, few special replications occur in practice, and it is sufficient to refer to the precedents indexed in 5 *Wentw. Index*, 102 to 144.

Other replications.

The conclusion of a replication with a verification is as follows: "And this he the said *A B* is ready to verify; wherefore he prays judgment, and his damages by him sustained, by reason of the said breach of covenant first above assigned to be adjudged to him, &c. See the precedent, 3 *Wentw.* 232.

Conclusion with a verification.

REPLICATIONS IN CASE.

[*Similiter to the general issue, as ante, 592.*] And as to the said pleas of the said *C D* by him secondly and thirdly above

To pleas justifying words, de injuria. (i)

(h) See the plea, *ante*, 496. and the precedent, 9 *Wentw.* 24. See replications *de injuria*, 3 *Wentw.* 423, 424. n. 7. (i) See the pleas, *ante*, 503 to 507. and the precedents, and law, 1 *Saund.*

In case. pleaded, the said *A B* saith, that he by reason of any thing by the said *C D* in those pleas above alleged, ought not to be barred from having and maintaining his aforesaid action against the said *C D*, in respect to the grievances in the introductory part of those pleas mentioned. Because he saith that the said *C D*, at the said time when, &c. in the said first and second counts mentioned, of his own wrong, and without the cause by him the said *C D* in his said second and third pleas, or either of them, mentioned, did commit the said grievances in the introductory part of those pleas mentioned, in manner and form as the said *A B* hath above thereof complained against him the said *C D*, to wit, at, &c. aforesaid. And this he the said *A B* prays may be inquired of by the country, &c.

* 629

*PLEAS IN BAR, &c. IN REPLEVIN.

In general.

1. Similiter to non cepit. (k)

And the said *A B*, as to the said plea of the said *C D* by him first above pleaded, and whereof he hath put himself upon the country, doth the like.

2. Commencement of a plea in bar to an avowry.

And the said *A B*, as to the said avowry of the said *C D*, saith, that the said *C D* by reason of any thing by him in that avowry above alleged, ought not to avow the taking of the said cattle, (or "*goods and chattels*,") in the said place in which, &c. and justly, &c. because he saith, that, &c.

3. The like to a cognisance.

And the said *A B*, as to the said cognisance of the said *C D*, saith, that the said *C D* by reason of any thing by him in that cognisance above alleged, ought not as bailiff of the said *E F*, to acknowledge the taking of the said cattle, (or "*goods and chattels*,") in the said place in which, &c. and justly, &c. because he saith, that, &c.

(k) See the plea, *ante*, 508.

And the said *A B*, as to the said avowry and cognisance of the said *C D* and *E F* by them first above made, saith, that by reason of any thing therein contained the said *C D* in his own right ought not to avow, and the said *E F* as bailiff of the said *C D* ought not to acknowledge the taking of the said cattle, goods and chattels in the said place in which, &c. and justly, &c. because he saith, that, &c.

In general.
4. The like to an avowry and cognisance.

* 630

* And for a farther plea in this behalf to the said first avowry (or "*cognisance*") of the said *C D*, the said *A B* by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, saith, the said *C D*, by reason of any thing in his said avowry (or "*cognisance*") alleged, ought not to avow (or "*as bailiff of the said E F ought not to acknowledge*") the taking of the said cattle, goods, and chattels of the said *A B* in the said place in which, &c. and justly, &c. because he saith, that, &c.

5. Commencement of a second plea in bar, by leave, &c.

And this he the said *C D* prays may be inquired of by the country, &c.

6. Conclusion to the country.

And this he the said *A B* is ready to verify; wherefore, inasmuch as the said *C D* hath above acknowledged the taking of the said cattle, goods and chattels in the said place in which, &c. he the said *A B* prays judgment and his damages, by reason of the taking and unjustly detaining the same, to be adjudged to him, &c.

7. Conclusion with a verification.

And this he is ready to verify; wherefore, inasmuch as the said *C D* in his own right hath avowed, and the said *E F* as bailiff of the said *C D*, hath acknowledged the taking of the said cattle, goods and chattels, in the said place in which, &c. he the said *A B* prays judgment, and his damages by reason of the taking and unjustly detaining thereof, to be adjudged to him, &c.

8. The like to an avowry and cognisance.

[Commencement of plea in bar, as ante, 629, 630.] Because he saith, that the said *A B*, (or "*E F*,") did not hold or enjoy the said dwelling-house in which, &c. with the appurtenances, as tenant thereof to the said *C D*, (or "*the said G H*,")

For rest.
Traverse of the demand.

For rent.

under the said supposed demise thereof, in the said avowry (or "*cognisance*") mentioned, in manner and form as the said *C D* hath above in his said avowry (or "*cognisance*") in that behalf alleged, and this he the said *A B* prays may be inquired of by the country, &c.

* 631

No rent in arrear.

[*Commencement of plea in bar, as ante, 629, 630.*] Because he saith, that no part of the said supposed rent, in the said avowry (or "*cognisance*") mentioned, was, or is in arrear, from the said *A B* to the said *C D*, (or "*G H*," in manner and form as the said *C D* hath, in his said avowry (or "*cognisance*") in that behalf alleged, and this he the said *A B* prays may be inquired of by the country, &c.

That defendant was not bailiff. (1)

[*Commencement of plea in bar, as ante, 629, 630.*] Because he saith, that the said *C D* at the said time, when, &c. was not the bailiff of the said *E F* in manner and form as he the said *C D* hath above in his said cognisance in that behalf alleged, and this he the said *A B* prays may be inquired of by the country, &c.

Payment of rent to ground landlord. (m)

[*Commencement of plea in bar, as ante, 629, 630.*] Because he saith, that the said *C D*, from the — day of —, *A. D.* —, and from thence for a long space of time, to wit, from thence until and upon the — day of —, *A. D.* —, held the said dwelling-house, in which, &c. as tenant thereof, to one *E F*, at and under a certain yearly rent, to wit, the yearly rent or sum of —*l.* of lawful, &c. to be paid at the four most usual feasts, or days of payment of rent in the year, that is to say, &c. (*here enumerate the quarterly days of payment*) by even and equal portions. And the said *C D* further saith, that before the said time, when, &c. to wit, on the — day of —, *A. D.* —, and on divers other days and times between that day and the — day of —, *A. D.* —, divers sums of money of the said yearly rent, in the whole amount—

* 632

(1) As to this plea in bar, see 1 proper, Morg. Pres. 53. 1 Saml. Saund. 347. c. n. 4. 2 Leon. 169. 103. a.
The conclusion to the country is (m) See 4 T. R. 511. Payment of land-tax, Doug. 624, 625.

ing to a large sum of money, to wit, the sum of —l. of like lawful money, became and were due, and in arrear from the said *A B* to the said *E F*; and thereupon the said *E F*, on divers days and times, after the said several days and times when the said several sums of money so due and in arrear as aforesaid, and before the said time, when, &c. required payment of the said several sums of money so due and in arrear as aforesaid, of the said *A B* as being the occupier of the said dwelling-house, in which, &c. and thereupon the said *A B* in order to prevent the goods and chattels at the said several times being in the said dwelling-house, in which, &c. from being distrained, at the said several times, when, &c. when the said *A B* was so required as aforesaid, paid the said several sums of money so due and in arrear from the said *C D* to the said *E F* as aforesaid, which said several sums of money, so paid by the said *A B* to the said *E F* as aforesaid, greatly exceeded the amount of the rent due and in arrear from him the said *A B* to the said *C D* in manner and form as the said *C D* hath above in his said cognisance in that behalf alleged. And this, &c. [*conclude as ante*, 630. *seventh precedent*.]

And the said *A B* as to the said cognisance of the said *C D* by him above made, saith, that the said *C D* ought not by reason of any thing in that cognisance alleged to acknowledge the taking of the said goods and chattels in the said place, in which, &c. and justly, &c. because as to the sum of —l. parcel of the said rent in the said cognisance alleged to be due, and in arrear, and unpaid *from the said *A B* to the said *E F*, the said *A B* saith that no part of the said sum of —l. at the said time, when, &c. was in arrear in manner and form as the said *C D* hath in his said cognisance above alleged; and this he the said *A B* prays may be inquired of by the country, &c. And as to the sum of —l. residue of the said rent or sum of —l. in the said cognisance alleged to be due, and in arrear and unpaid from the said *A B* to the said *E F*, the said *A B* saith, that after the said feast day of *St. Michael* the Archangel, *A. D.* —, and before the said

No rent in arrear as to part, and tender as to the residue. (e)

* 633

(e) As to this plea, *ante*, 498. 8 Co. 147. a.

For rent.

time, when, &c. to wit, on the — day of —, in the year aforesaid, at, &c. aforesaid, he the said *A B* tendered and offered to pay to the said *E F*, the said sum of —*l.* which the said *E F* then and there refused to accept and receive of and from him the said *A B*; and that after the said tender, and before the said distress was so made and taken as aforesaid, no request or demand of the said sum of —*l.* was ever made by or on the behalf of the said *E F*. And this, &c. [*conclude with a verification, as ante, 630. seventh precedent.*]

Eviction. (*p*)

[*Commencement of plea in bar, as ante, 629, 630.*] Because he saith, that the said *C D* after the making of the said demise in the said first avowry mentioned, and before any part of the said rent therein mentioned became due or in arrear, to wit, on, &c. *A. D.* —, at the parish aforesaid, in the county aforesaid, with force and arms, &c. entered into a certain messuage or dwelling-house, parcel of the said demised premises in the said avowry alleged to have been demised, in and upon the possession of him the said *A B* thereof, and him the said *A B* from his possession thereof, ejected, expelled, put out and amoved, and kept and continued the said *A B* so ejected, expelled, put out and amoved from his possession thereof, from thence, until, and upon and after the said — day of —, *A. D.* —. And this, &c. * [*conclude with a verification, as ante, 630. seventh precedent.*]

* 634

To avowry damage-tenant by freeholder, denial of his title. (*q*)

[*Commencement of plea in bar, as ante, 629, 630.*] Because he saith, that the said place in which, &c. now is and at the said time, when, &c. was the close, soil and freehold of him the said *A B*, and not the close, soil and freehold of the said *C D*, (or "*G H*," in manner and form as the said *C D* hath above in his said avowry (or "*cognisance*") in that behalf alleged; and this he the said *A B* prays may be inquired of by the country, &c.

(*p*) See the pleas of eviction, *ante*, 486. and 1 Saund. 204. n. 2.

(*q*) See the avowry, *ante*, 516. As to this plea in bar, see 2 Saund. 206. a. n. 22. If there be any doubt as to

the plaintiff being a freeholder, the plea in bar should merely traverse the defendant's title without stating the plaintiff's, which in all cases is sufficient.

[*Commencement of plea in bar, as ante, 629, 630.*] Because he saith, that the said *E F* in the said avowry (or "*cognisance*") mentioned, did not demise the said place, in which, &c. to the said *C D* in manner and form as the said *C D* hath above in his said avowry in that behalf alleged; and this he the said *A B* prays may be inquired of by the cōuntry, &c.

Damage feasant.

To avowry damage-feasant by tenant, traverse of the demise. (r)

[*Commencement of plea in bar, as ante, 629, 630.*] Because he saith, that long before the said time, when, &c. to wit, on, &c. at, &c. aforesaid, he the said *C D* demised the said place in which, &c. with the appurtenances to the said *A B*, to have and to hold the same to the said *A B*, from the — day of —, in the year last aforesaid, for one year then next following, and fully to be complete and ended, and so from year to year, for so long time as the said *C D* and *A B* should respectively please: By virtue of which said demise, he the said *A B* long before the said time, when, &c. to wit, on, &c. last aforesaid, entered into the said place, in which, &c. with the appurtenances, and became and until and at the said time when, &c. was possessed thereof, and being so possessed thereof, he the said *A B*, afterwards and during the continuance of the said tenancy, and before the said time, when, &c. to wit, on, &c. put the said cattle in the said declaration mentioned, into the said place in which, &c. to feed and depasture on the grass there then growing, and which said cattle were lawfully in and upon the said place, in which, &c. feeding and depasturing on the grass there then growing, from thence until the said *C D* of his own wrong, at the said time, when, &c. during the continuance of the said tenancy, took the said cattle in the said declaration mentioned, in and upon the said place, in which, &c. and detained the same against sureties and pledges, until, &c. in manner and form as the said *A B* hath above complained against him the said *C D*. And this, &c. [*conclude with a verification, as ante, 630. seventh precedent.*]

To avowry damage-feasant by freeholder or leaseholder, that defendant demised locus in quo to plaintiff. (s)

(r) See the avowry, *ante*, 516.

(s) The demise must be stated according to the facts, see the precedent, *ante*, 215.

Damage feasant.

To avowry for distress damage feasant that plaintiff's cattle escaped into locus in quo through the defect of fences which the occupier ought to have repaired. (t)

[Commencement of plea in bar, as ante, 629, 630.] Because he saith, that he the said *A B* before and at the said time when, &c. was lawfully possessed of and in a certain close, &c. (state the plaintiff's possession of the adjoining close, and the obligation of the occupier of locus in quo to repair the fence, and that the fence was out of repair, and that plaintiff's cattle thereby escaped into locus in quo, as in the precedent, ante, 557, 558, 559. and 2 Saund. 284, 285. and after stating such escape, proceed as follows :) † and remained therein until the said *C D* before the said *A B* had or could have any notice that the said cattle were in the said place in which, &c. to wit, at the said time, when, &c. of his own wrong, took the said cattle in the said place, in which, &c. and unjustly detained the same against sureties and pledges, *in manner and form as he the said *A B* hath above thereof complained against him the said *C D*. And this, &c. (conclude with a verification, as ante, 630. seventh precedent, see 2 Saund. 285. a.)

• 636

The like stating defendant's obligation to keep a gate shut. (u)

[Commencement of plea in bar, as ante, 629, 630.] Because he saith, that the said field or place, called, &c. now lieth, and at the said time, when, &c. did lie, and from time whereof the memory of man is not to the contrary, hath lain, contiguous and next adjoining on one side thereof to a certain field or place, called, &c. situate and being in the said parish of —, in the county of —, and separated and divided therefrom by a certain hedge or fence, and in which said hedge or fence, long before and at the said time, when, &c. there was and still is a certain gate and gateway, leading from and out of the said field or place, called, &c. into the said field or place, called, &c. in which, &c. And the said *A B* further saith, that the said *C D* and all others the tenants and occupiers of the said field or place, called, &c. in which, &c. for the time

(t) See the precedent and law, 2 law, 2 Hen. Bl. 527. 3 Wils. 126. Saund. 254. c. 285. n. 4. 289. n. 7. and The above precedent will also serve as a plea in bar to an avowry of rent, see 2 Saund. 284. c. (u) See the note to the last precedent.

being, from time whereof the memory of man is not to the contrary, have repaired and maintained, and have been used and accustomed to repair and maintain, and of right ought to have repaired and maintained, and still of right ought to repair and maintain, the said gate or gateway in the said hedge or fence between the said field or place, called, &c. in which, &c. and the said field or place, called, &c. as often as occasion hath required, and to keep the said gate or gateway in the said, hedge or fence shut and fastened, to prevent the escape of cattle from and out of the said field, called, &c. into the said field or place, called, &c. in which, &c. And the said *A B* further saith, that before and at the said time, when, &c. he the said *A B* was lawfully possessed of and in the said field or place, called, &c. and being so possessed thereof, he the said *A B* a little before the said time, when, &c. put the said cattle in the said declaration mentioned, (the same being the cattle of him the said *A B*.) into the said field or place, called, &c. to feed and depasture the grass there then growing and being, as it was lawful for him to do for the cause aforesaid; and the said *A B* further saith, that afterwards, and a little before the said time, when, &c. because the said gate in the said hedge or fence, between the said field or place, called, &c. in which, &c. and the said field or place, called, &c. was open, and not shut and fastened, the said cattle in the said declaration mentioned, at the said time, when, &c. strayed and went, without the knowledge and against the will of him the said *A B*, from and out of the said field or place, called, &c. into the said field or place, called, &c. in which, &c. and remained therein, until, &c. [*conclude as in the last precedent 635. from the obelisk.*]

Damage feasant.

* 637

[*Commencement of plea in bar, as ante, 629, 630.*] Because he saith, that the said place, in which, &c. before and at the said time, when, &c. and from time whereof the memory of man is not to the contrary, hath been, and still is, contiguous and next adjoining to a certain common or waste, situate, lying and being in the parish aforesaid, in the county aforesaid, and

The like that locus in quo adjoins a common in which plaintiff had right of common, and that the cattle escaped through defect of fence between the common and locus in quo, which defendant ought to have repaired. (r)

(x) See the notes to the precedents, *ante*, 535, 557. 635.

Damage feasant.

* 638

that the said *C D*, and all other the tenants and occupiers of the said close, in which, &c. for the time being, from time whereof the memory of man is not to the contrary, hitherto of right have maintained and repaired, and until the neglect hereinafter mentioned, have been used and accustomed to maintain and repair, the fence between the said close, in which, &c. and the said common or waste, called —, when and as often as occasion hath required, and should require, to prevent cattle lawfully being in and upon the said common or waste, called —, from escaping from and out of the same into the said close, in which, &c. And the said *A B* further saith, that, &c. (*here state the seisin in fee, and *prescriptive right of common, as ante, 517, 518. If by a copyholder, state the copyhold and right of common, as ante, 565, 566. or if the plaintiff be a tenant, state the demise, as ante, 215. or 516. and then proceed as follows :*) And being so possessed thereof, he the said *A B* afterwards, and before the said time, when, &c. to wit, on the said — day of —, put his said cattle in the said declaration mentioned, the same then and there being his own commonable cattle, *levant and couchant*, in and upon the said messuage, lands and premises, with the appurtenances, of the said *A B*, into the said common or waste, called —, to depasture the grass there then growing, and to use his said common of pasture there, as it was lawful for him to do for the cause aforesaid, and the said cattle remained there, using the said common of pasture there, until the escape thereof hereinafter mentioned ; and because the said fence, between the said common or waste, called, &c. and the said close, in which, &c. before and at the said time, when, &c. was ruinous, broken down, insufficient, and in decay for want of necessary repairing and amending thereof, and the said cattle of the said *A B* in the said declaration mentioned, a little before the said time, when, &c. to wit, on the said — day of —, *A. D.* — aforesaid, escaped out of the said common or waste, called, &c. into the said close, in which, &c. through the said defect of the said fence, and remained therein, until, &c. [*conclude as in the precedent, ante, 635. from the obelisk.*]

[*Commencement of plea in bar, as ante, 629, 630.*] Because he saith, that, &c. (*here state the seisin in fee, and prescriptive right of common in locus in quo, as ante, 517, 518. or if by a copyholder, as ante, 565, 566. and if the plaintiff be a tenant, after the seisin and prescriptive right of common, state the demise of entry, as ante, 215. or 516. and then proceed as follows:*) And the said *A B* being so possessed, he the said *A B*, afterwards and before the said time, when, &c. to wit, on the day and year in the said declaration mentioned, turned and put the said cattle, being his own commonable cattle, *levant* and *couchant*, in and upon the said messuage and land with the appurtenances, into the said close, in which, &c. to feed and depasture on the grass there then growing, and to use the said common of pasture of the said *A B* there, as he lawfully might, and the said cattle remained and continued therein, feeding and depasturing on the grass there then growing, and using the said common of pasture until the said *C D*, of his own wrong, at the said time, when, &c. took the said cattle in the said place, in which, &c. and unjustly detained the same against sureties and pledges, until, &c. in manner and form as the said *A B* hath above thereof complained against him. And this, &c. [*conclude with a verification, as ante, 630.*]

Damage feasant.

To show damage feasant, that plaintiff had a right of common in locus in quo. (y)

* 639

[*Commencement of plea in bar, as ante, 629, 630. seventh precedent.*] Because he saith, that after the taking of the said cattle in the said place, in which, &c. by the said *C D*, and before the impounding of the same, to wit, on the same day and year in the said declaration mentioned, at the parish aforesaid, in the county aforesaid, he the said *A B* tendered and offered to pay to the said *C D* a certain sum of money, to wit, the sum of —*l.* of lawful money of *Great Britain*, as amends for the said damage done to him the said *C D*, by the said cattle in the said place, in which, &c. as aforesaid, and which was then and there sufficient amends for the same; which said sum of —*l.* the said *C D* then and there wholly refused to ac-

Tender of amends before impounding. (z)

(y) See the precedent, 2 Wils. 269. bar and replication, Gilb. Dis. by

(z) See the precedent of plea in Hunt. 286. 8 Co. 147. a.

Damage feasant.

cept from the said *A B*, and unjustly detained the said cattle against sureties and pledges, &c. until, &c. in manner and form as the said *A B* hath above thereof complained against him the said *C D*. And this, &c. [*conclude with a verification, as ante, 630. seventh precedent.*]

* 640

The avowry damages feasant by a commoner, denial of his right of common. (q)

*[*Commencement of plea in bar, as ante, 639. and 630.*] Because he saith, that the said *C D*, and all those whose estate he now hath, and at the said time, when, &c. had of and in the said messuage and land, with the appurtenances, for the time being, from time whereof the memory of man is not to the contrary, have not had, nor have been used and accustomed to have, nor of right ought to have had, nor ought the said *C D* still of right to have, for himself and themselves, his and their tenants, and farmers, occupiers of the said messuage and land, with the appurtenances, common of pasture, in, upon, and throughout the said place, in which, &c. called —, for all his and their commonable cattle, *levant and couchant*, in and upon the said messuage or land, with the appurtenances, in every year, at all times of the year, as to the said messuage or tenement and land, with the appurtenances, belonging and appertaining; in manner and form as the said *C D* hath above in his said avowry in that behalf alleged. And this he the said *A B* prays may be inquired of by the country, &c.

(q) See the avowry, *ante*, 517, 518. And as to the mode of denial, see 1 Saund. 103. 1. The plaintiff may either traverse the defendant's seisin in fee or his right of common, or may plead in bar his own right of common as in the form, *ante*, 518, 563. The words of the traverse, as they depend on the avowry, necessarily vary in each particular case.

*REPLICATIONS IN TRESPASS.

[*Similiter to general issue, as ante, 592. and commencement of replication to the special plea as follows:*] And the said *A B*, as to the said plea of the said *C D* by him secondly above pleaded, as to the said several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, saith, that he the said *A B* by reason of any thing by the said *C D* in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him the said *C D*, because he saith, that, &c. [*here state the subject matter of the replication.*]

In general.
Commence-
ment of a re-
plication to a
special plea in
trespass, call-
ed precludi
non.

And this he the said *A B* is ready to verify ; wherefore the said *A B* prays judgment and his damages by him sustained, by reason of the committing of the said trespasses to be adjudged to him, &c.

2. Conclusion
with a verifi-
cation.

[*Precludi non, ut supra.*] Because he saith, that the said sum of —*l.* in the said plea mentioned, and therein alleged to have been tendered by him the said *C D* to the said *A B* as aforesaid, was not sufficient amends for the said trespasses, in manner and form as the said *C D* hath above in his said plea alleged ; and this he the said *A B* prays may be inquired of by the country, &c.

To plea of ten-
der, that the
amends were
not sufficient.
(r)

[*Precludi non, ut supra.*] Because he saith, that the said *C D* at the said time, when, &c. of his own wrong, and without the cause by him in his said second plea alleged, committed the said several trespasses in the introductory part of that plea mentioned, in manner *and form as the said *A B* hath above in his said declaration complained against him the said

De injuria, or
de son tort de-
mesne.(s)

(r) See the plea, *ante*, 590. And as to this replication, *Com. Dig. Pleading*, 3 M. 36. And the replications to pleas of tender, *ante*, 596 to 601.

(s) When this replication is proper, see *Com. Dig. Pleading*, F. 18. &c. 1 B. & P. 76. 2 Bl. Rep. 1165. and *ante*, vol. 1. Index, tit. De Injuria.

I. To persons. *C D*; and this he the said *A B* prays may be inquired of by the country, &c.

De injuria to son assault demesne. (t)

[*Precludi non, as ante*, 641.] Because he saith, that the said *C D*, at the said time, when, &c. of his own wrong, and without the cause by him in his said second plea alleged, assaulted, beat, and ill-treated the said *A B*, and rent, tore, damaged and spoiled the said wearing apparel of the said *A B*, in manner and form as the said *A B* hath above in the said first count of his said declaration complained against him the said *C D*; and this he the said *A B* prays may be inquired of by the country, &c.

To plea of son assault demesne, that E F was possessed of a house, and that A B, as his servant, made the supposed assault to turn defendant out. (u)

[*Precludi non, as ante*, 641.] Because he saith, that long before, and at the said time, when, &c. in the said first count mentioned, one *E F* was lawfully possessed of a certain dwelling-house, with the appurtenances, situate and being in the parish aforesaid, and being so possessed thereof. the said *C D* just before the said time, when, &c. in the said first count mentioned, was wrongfully and unjustly in the said dwelling-house, making a great noise and disturbance therein, and stayed and continued therein, making such noise and disturbance, without the license or consent, and against the will of the said *E F*, for a long space of time, to wit, until and at the said time, when, &c. in the said first count mentioned, and thereby then and there greatly disturbed and disquieted the said *E F*, and his family, in the peaceable and quiet possession, use, and enjoyment of the said dwelling-house, whereupon he the said *A B* at the said time, when, &c. in the said first count mentioned,

* 643

(t) See the pleas, *ante*, 523 to 537. And as to this replication in general, see Com. Dig. Pleader, 3 M. 16. and F. 18. &c. The replication may in general be *de injuria* as above; but when in fact the plaintiff made the first assault in defence of his possession, &c. or whenever in answer to the defendant's plea of son assault, he relies upon new matter, he should not reply generally *de injuria*, but should state such new matter as in

the following precedent, and in Carth. 280. and 2 Bl. Rep. 1165.

(u) The general replication *de injuria*, would in this case be improper, as the assault pleaded by the defendant is not here denied, but confessed and avoided. See a case precisely similar in Carth. 280. and 2 Bl. Rep. 1165. and the note to the last precedent. As to stating the defence of possession, see *ante*, 529 to 532.

as the servant of the said *E F*, and by his command, requested *I. To persons.* the said *C D* to cease his said noise and disturbance, and to go and depart from and out of the said dwelling-house, which the said *C D* then and there refused to do; whereupon the said *A B* as such servant of the said *E F*, and by his command, gently laid his hands upon the said *C D* in order to remove him the said *C D* from and out of the said dwelling-house, as he lawfully might for the cause aforesaid, and which said laying of hands by the said *A B* on the said *C D*, in manner and for the cause aforesaid, was the said supposed assault by the said *C D* in his said second plea mentioned, to have been committed by the said *A B*: and thereupon the said *C D* being thereby then and there greatly irritated and enraged, at the said time, when, &c. in the said first count mentioned, of his own wrong, committed the said trespasses in the introductory part of the second plea mentioned, in manner and form as the said *A B* hath above thereof complained against the said *C D*, and this he the said *A B* is ready to verify. And the said *A B* is also ready to verify, that he did not assault the said *C D* as in the second plea mentioned, elsewhere than in the said dwelling-house of the said *E F*. Wherefore he prays judgment and his damages by him sustained, on occasion of the committing of the said trespasses in the introductory part of the said second plea mentioned, to be adjudged to him, &c.

[*Precludi non, as ante, 641.*] Because he saith, that he the said *C D* long before, and at the said time, when, &c. in the said first count mentioned, was, and still is, seised in his demesne as of fee, of and in a certain close, with the appurtenances, situate, lying and being contiguous and next adjoining to the said close of the said *C D*, in the said second plea mentioned, and that he the said *A B* and all, &c. (*here state the prescriptive, or *other right of way, as ante, 573, 574. &c. and then proceed as follows:*) wherefore he the said *A B* afterwards, and at the said time, when, &c. in the said first count mentioned, was about to put his said cattle into the said close of the said *C D* in the said second plea mentioned, to depasture the grass there then growing, and then and there endeavoured to open the said gate in the said plea mentioned, in order to lead his said cattle from and out of the said king's

To plea of defence of possession of close, (*ante, 531.*) that plaintiff had right of way over the close.

I. To persons. public highway. in and along the said way in the said close of the said *C D*, unto and into the said close of the said *A B*, as it was lawful for him to do for the cause aforesaid; and thereupon the said *C D*, at the said time, when, &c. in the said first count mentioned, of his own wrong, committed the said several trespasses in the introductory part of the said second plea mentioned, in manner and form as the said *A B* hath above in his said declaration alleged. And this, &c. [*conclude with a verification, as ante, 641.*]

To justification under a latitat and warrant, protesting the issuing of the writ and warrant, and de injuria as to the residue of the plea. (x)

[*Similiter to the general issue, as ante, 592. To second plea precludi non, as ante, 641.*] Because, protesting that the said writ of our said lord the king, called a *latitat*, was not issued out of the said court of our said lord the king, before the king himself, directed to the said sheriff of —, or delivered to the said sheriff to be executed, and that such warrant was not thereupon made by the said sheriff, or delivered to the said *C D*, in manner and form as the said *C D* hath above in his said second plea in that behalf alleged; for replication, nevertheless, in this behalf, the said *A B* saith, that the said *C D* at the said time, when, &c. in the said first count of the said declaration mentioned, of his own wrong, and without the residue of the cause in his said second plea alleged, made the said assault *in the said first count mentioned, upon the said *A B*, and pushed, forced, and thrust the said *A B* from and out of the said messuage or dwelling-house in the said first count mentioned, into the said street therein also mentioned, and while the said *A B* continued on the ground in the said street, pulled, hauled, and dragged him upon his back through the mud and dirt in and along the said street. and for the distance and length of way in the said first count also mentioned, and thereby hurt, bruised, and wounded the said *A B*, and imprisoned him the said *A B*, and kept and detained him in prison for the said space of time in the said first count mentioned; and also at the said time, when, &c. in the said second count of the said de-

* 645

(x) See the plea, *ante*, 537. Where process or a warrant is stated in the plea, the plaintiff cannot reply *de injuria* generally, but must either traverse the issuing of the writ or the warrant, or that the trespasses were committed in due execution thereof, Com. Dig. Pleading, F. 18, 19, 20. &c. 1 B. & P. 76.

claration mentioned, rent, tore, damaged, and spoiled the clothes and wearing apparel of the said *A B* in the said second count mentioned, to wit, at, &c. aforesaid, in manner and form as the said *A B* hath in and by the said first and second counts of his said declaration above complained against him the said *C D*. And this he the said *A B* prays may be inquired of by the country, &c.

[*Precludi non, as ante*, 641.] Because he saith, that before any of the said time, when, &c. and at the time of making the demise hereinafter next mentioned, and from thence hitherto, one *E F* was, and still is, seised in his demesne as of freehold, for the term of his natural life, of and in the said out-house, in which, &c. in the said second plea mentioned, and being so seised long before the said time, when, &c. to wit, on the — day of —, *A. D.* —, the said *E F* demised the said out-house, in which, &c. in the said second plea mentioned, amongst other things to the said *A B*, to have and to hold the same to the said *A B*, from thenceforth for one whole year then next following, and so from year to year so long as they the said *E F* and *A B* should respectively please. By virtue of which said demise the said *A B* afterwards, and before the said time, when, &c. to wit, on the — day of —, *A. D.* — aforesaid, entered into the said out-house in the said second plea mentioned, in which, &c. with the appurtenances, and became and was thereof possessed, and being so possessed, and the said *E F* being still living, to wit, at, &c. aforesaid, the said *A B* continued so possessed of the said out-house in the said second plea mentioned, under and by virtue of the said demise from thence until the said *C D*, during the continuance of the said tenancy, to wit, at the said time, when, &c. of his own wrong, broke and entered the said out-house, in which, &c. in the said second plea mentioned, and the said *C D* unlawfully became possessed thereof, and the said *C D*

II. To personal property.

To a plea of distress damage-fasant, that *E F* was seised of locus in quo and demised same to plaintiff, wherefore defendant of his own wrong, &c. (z)

* 646

(z) See the pleas, *ante*, 546, 548. common, and this replication may often be useful, as narrowing the evidence. The replication *de injuria*, is in general sufficient, except where the defence to be adduced upon the trial, plaintiff and defendant are tenants in 1 East, 212.

II. To personal property.

unlawfully committed the said trespasses in the introductory part of the said second plea mentioned, in manner and form as the said *A B* hath above thereof complained against him the said *C D*. And this, &c. [*conclude with a verification, as ante, 641.*]

To a plea of distress damage-feasant, that plaintiff had right of common in locus in quo. (a)

[*Precludi non, as ante, 641.*] Because he saith, that one *E F* long before the said time, when, &c. was seised in his demesne as of fee, of and in divers, to wit, — acres of land, with the appurtenances, situate, lying, and being in the said parish of —, in the said county of —, and that the said *E F* and all those whose estate he now hath, &c. (*here state the prescriptive right of common and demise to the plaintiff, and his putting on his commonable cattle as in the pleas in bar in reply, ante, 638, 639.*) and the said cattle, at the said time, when, &c. remained and continued feeding and depasturing in the said close, in which, &c. and using the said common of pasture there until the said *C D* at the said time, when, &c. of his own wrong committed the said trespasses in the introductory part of the said second plea mentioned. And this, &c. [*conclusion with a verification, as ante, 641.*]

* 647

To a plea of distress damage-feasant, defect of fences.

[*Precludi non, as ante, 641.*] Because he saith, that the said close in the said second plea mentioned, before and at the said time, when, &c. did lie, and still doth lie, contiguous and next adjoining to a certain common and public king's highway, in the parish aforesaid, and that the said *C D* and all other the tenants and occupiers of the said close, in which, &c. with the appurtenances for the time being, from time, &c. (*here state the obligation to repair, and the defect of the fences, and that the plaintiff's cattle being driven along the way, thereby escaped into the close, as ante, 557, 558, 559. 634. and then proceed as follows:*) and remained and continued in the said close, in which, &c. until the said *C D* at the said time, when, &c. in the said first count mentioned, and before the said *A B* could

(a) See the plea, *ante*, 346. and the replication. 1 Saund. 222. and *ante*, 638.

drive the said cattle from and out of the said close, in which, &c. of his own wrong, seized, took, and carried away the said cattle, and impounded the same, and kept and detained the same so impounded for the said space of time in the said first count mentioned. And this, &c. [*conclude with a verification, as ante, 641.*]

II. To personal property.

[*Precludi non, as ante, 641.*] Because he saith, that after the taking and impounding the said cattle in the said declaration mentioned by the said *C D* in the name of a distress, in manner and form as the said *C D* hath in his said second plea in that behalf above alleged, to wit, on, &c. aforesaid, at, &c. aforesaid, he the said *C D* converted and disposed of the said cattle to his own use, in manner and form as the said *A B* hath above thereof complained against him the said *C D*. And this, &c. [*conclude with a verification, as ante, 641.*]

To a plea of distress damage-*feasant*, that defendant converted distress to his own use. (b)

* 648

*[*Precludi non, as ante, 641.*] Because he saith, that the said close in the said declaration mentioned, in which, &c. now is, and at the said several times, when, &c. was the close, soil, and freehold of him the said *A B*, (d) and not the close, soil and freehold of him the said *C D*, in manner and form as he the said *C D* hath above in his said second plea alleged; and this he the said *A B* prays may be inquired of by the country, &c.

III. To real property.
To *liberum tenementum*, denial of plea. (c)

[*Precludi non, as ante, 641.*] Because he saith, that whilst the said dwelling-house was the dwelling-house and freehold

To *liberum tenementum*, demise by defendant to plaintiff.

(b) See the precedent, 3 Wils. 20.

(c) When the name of the close, or the abutals thereof, have been set forth in the declaration with such certainty as to preclude the possibility of the defendant's having another close of the same name or abutals in the same parish, the above replication will suffice, unless the plaintiff claim as tenant, &c. under the defendant, when the plea must be special as in the following precedent. When the close is not set forth with name or abutals, and there is any

reason to apprehend that the defendant may be able to prove that he is seized of any close in the same parish, it is necessary to new assign, setting out the name and abutals as in the precedent, *post*, 656. See 1 Saund. 299. b. c.

(d) This allegation is not necessary, it is sufficient to traverse the close being the plaintiff's, and where in fact the *locus in quo* was not the plaintiff's freehold, this allegation should be omitted.

REPLICATIONS

of the said *C D*, and before the said time, when, &c. to wit, on, &c. at, &c. aforesaid, he the said *C D* demised the said dwelling-house, with the appurtenances, to the said *A B* to have and to hold the same to him the said *A B* for and during, and unto the full end and term of one year from thence next ensuing, and fully to be complete and ended, and so from year to year, for so long time as they the said *A B* and *C D* should respectively please. By virtue of which said demise, he the said *A B* afterwards, and before the said time, when, &c. entered into the said dwelling-house, and became and was possessed thereof, and continued so thereof possessed from thence until the said *C D* afterwards, and during the continuance of the said demise, to wit, at the said
 9 *time, when, &c. of his own wrong, broke and entered the said dwelling-house, and committed the said several trespasses in the introductory part of the said second plea mentioned, in manner and form as the said *A B* hath above thereof complained against him the said *C D*. And this, &c. [*conclude with a verification, as ante, 641.*]

plea of denial
 sc.(c) [*Precludi non, as ante, 641.*] Because he saith, that the said *C D*, at the said time, when, &c. of his own wrong, and without the leave and license of the said *A B* to him the said *C D* first given and granted in that behalf, committed the said several trespasses in the introductory part of the said second plea mentioned, in manner and form as the said *A B* hath above thereof complained against him the said *C D*; and this he the said *A B* prays may be inquired of by the country, &c.

of es-
 tablish-
 ment
 at de-
 turn-
 cattle
 out in
 [*Precludi non, as ante, 641.*] Because he saith, that just before the said time, when, &c. the said cattle in the said declaration mentioned, were wrongfully turned and driven by the said *C D* from and out of the said highway into and upon the said close, or piece, or parcel of land, in which, &c. and upon that occasion, and by means, and in consequence thereof, the

(c) See the precedent, 9 Wentw. 24. (d) *Quare* the necessity for a traverse, see the next precedent.

said cattle were, at the said first time, when, &c. in the said close, in which, &c. depasturing on the grass there then growing, and doing damage there, in manner and form as the said *A B* hath above thereof complained against him the said *C D*. And this, &c. *[conclusion, with a verification, as ante, 641.]*

[Precludi non, as ante, 641.] Because he saith, that the said banks, mounds and fences between the said closes of the said *C D* and the said close, or piece or parcel of land of the said *A B*, before and at the said several times, when, &c. in the said plea of the said *C D*, and in the said declaration above respectively mentioned, at, &c. *aforesaid, were well and sufficiently maintained and repaired to prevent cattle, feeding and being in the said close of the said *C D*, from escaping from and out of the same into the said closes of the said *A B*, and that the said cattle of the said *C D* in the said second plea mentioned, at the said several times, when, &c. were wild, ungovernable and unruly, and used to break down banks, mounds and fences in good repair, and that the said cattle of the said *C D* at the said several times, when, &c. at, &c. aforesaid, through their said wild, ungovernable and unruly disposition, broke down the said mounds, banks and fences, between the said close of him the said *A B* and the said close of the said *C D*, the same then being well and sufficiently maintained and in good repair as aforesaid, and through the breach of the said banks, mounds and fences so made by the said cattle of the said *C D* as aforesaid, the said cattle, at the said several times, when, &c. entered into the said close of the said *A B*, and eat up the grass and herbage of the said *A B* then growing there, and did damage there, in manner and form as the said *A B* hath above in his said second plea in that behalf alleged; without this, that the said cattle so being in the said close, or piece or parcel of land of him the said *A B* as aforesaid, a little before the said several times, when, &c. in the said second plea mentioned, and against the will of the said *C D*, and without his knowledge or consent, escaped from the said close, or piece or

III. To real property.

To plea of escape through defect of fences, that defendant's cattle were unruly, &c.

* 650

Traverse. (d)

III. To real property.

parcel of land of him the said *C D* through the defects and insufficiency of the said banks, mounds and fences between the said close of the said *C D*, and the said close, or piece or parcel of land of the said *A B*, as the said *C D* hath above in his said second plea in that behalf alleged. And this, &c. [*conclude a verification, as ante, 641.*]

To plea of prescriptive right of common, denial of the right.
(e)

* 651

[*Precludi non, as ante, 641.*] Because he saith, that the said *C D* and all those whose estate he now hath, *and at the said several times, when, &c. had, of and in the said messuage and land, with the appurtenances for the time being, from time whereof the memory of man is not to the contrary, have not had, nor have been used and accustomed to have, nor of right ought to have had, nor ought the said *C D* still of right to have, for himself and themselves, his and their tenants and farmers, occupiers of the said messuage and land, with the appurtenances, common of pasture, in, upon and throughout the said close, in which, &c. for all his and their commonable cattle, levant and couchant, in and upon the said messuage and land, with the appurtenances, in every year, at all times of the year, as to the said messuage and land, with the appurtenances belonging and appertaining in manner and form as the said *C D* hath above in his said second plea in that behalf alleged; and this he the said *A B* prays may be inquired of by the country, &c.

To plea of right of common, approval of common.

See the precedents, *Rast. Ent.* 626. b. 9 *Wentw.* 205. *Thomp. Ent.* 453. *Willes*, 57. 3 *T. R.* 445. and of a custom to enclose lands in a common field, and that after such enclosure the *locus in quo* is not commonable, see 2 *Wils.* 270.

Observations on traverses of rights of common and ways in general.

From the note to the last precedent it will appear, that where the right of common, or way, as stated by the defendant, is denied by the plaintiff, it is in general sufficient merely to deny such

(e) See the pleas, *ante*, 563. and 517, 518. It is very usual in practice to reply specially *de injuria*, and to conclude with a formal traverse of the right of common, way, &c. and conclude to the country. 1 *Strand.* 103. b. n. 3. 1 *Ld. Raym.* 631. common, &c. is necessary, which occasions unnecessary expense and delay; for the replication ought directly to deny the right of common, and conclude to the country. 1 *Strand.* 103. b. n. 3. 1 *Ld. Raym.* 631.

right as in the last precedent, following the language of the plea, and concluding to the country. This rule has been most ably deduced from the cases in the books, by Mr. Serjeant *Williams*, 1 *Saund.* 103. b. where he states, that courts of justice discourage unnecessary prolixities in pleading, because they tend to *expense and delay, and that, therefore, where a defendant cannot take any new or other issue in his rejoinder than the matter he had pleaded before, without a departure from his plea, or where the issue on the rejoinder would be the same in substance as on the plea, that the plaintiff ought to conclude to the country, as where the plea states a defect of fences, a prescription for a right of common, or way, &c. in which the better and shorter method is directly to deny the fact of defect of fences, prescription and the like, without a formal traverse, and conclude to the country, 1 *Saund.* 103. b. 1 *Ld. Raym.* 641. In denial of the prescriptive right of way, &c. the replication will be similar to the last precedent, except in the part in *italics*, which must necessarily be according to the facts and the language of the plea.

III. To real property.

* 652

NEW ASSIGNMENTS.

[*Precludi non, as ante*, 593.] Because he saith, that he exhibited his said bill against the said *C D*, and brought his

In assumption.

To plea of judgment recovered, new assignment that the action was brought for breaches of contracts different to those mentioned in the plea. (c)

(c) See the precedents, 3 *Wentw.* 151 to 153. and 6 *T. R.* 607. But the former appears too prolix, and the latter precedent may be incorrect, according to the case in 3 *Lev.* 92. in which it was held, that to a justification in trespass, concluding with a statement that the trespasses mentioned in the plea were those men-

tioned in the declaration, the plaintiff could not reply that *they were not the same*, without shewing some other trespass; and this seems proper, in order that the defendant may have an opportunity of pleading to the new assignment; see also another precedent, 4 *T. R.* 146. And see the plea to this new assignment, 6 *Wentw.*

In assumption. suit thereupon, not for the non-performance of the said promises and undertakings in the said plea of the said *C D* mentioned, and in respect whereof the said judgment therein also mentioned, was so recovered as aforesaid, but for the non-performance of other and different promises and undertakings made by the said *C D* to the said *A B*, in manner and form as the said *A B* *hath above thereof complained against him the said *C D*, and this he the said *A B* is ready to verify; wherefore, inasmuch as the said *C D* hath not answered the said complaint of the said *A B* as to the said breach and non-performance of the said promises and undertakings in the said declaration mentioned, and so newly above assigned as aforesaid, he the said *A B* prays judgment and his damages, by reason of the non-performance thereof, to be adjudged to him, &c.

* 658

In trespass to persons.

To plea of son assault demesne, new assignment that the action was brought for a different assault. (f)

[*Precludi non, as ante, 641.*] Because he saith, that he the said *A B* exhibited his said bill against the said *C D*, and brought his suit thereupon, not for the trespasses in the introductory part of the said second plea mentioned, but for that the said *C D* on the said — day of —, *A. D.* —, with force and arms, &c. at, &c. aforesaid, upon another and different occasion, and for another and different purpose than in the said plea mentioned, made another and different assault upon the said *A B* than the said assault in the said second plea mentioned, and then and there beat, bruised, wounded, and ill-treated the said *A B* in manner and form as the said *A B* hath above thereof complained against the said *C D*, and which said trespasses above newly assigned, are other and different trespasses than the said trespasses in the said second plea mentioned; and this he the said *A B* is ready to verify; wherefore, inasmuch as the said *C D* hath not answered the said trespasses above newly assigned, he the

Conclusion.

163. And as to new assignments in general, 2 Saund. 299. n. 6. *Ante*, vol. 1. Index, tit. New Assignment. Whenever the plaintiff has in truth recovered a judgment, for a cause of action similar to that mentioned in the declaration, and the defendant pleads such recovery in bar, a new assignment is necessary; so it may be ne-

cessary in some cases, where the defendant has pleaded partnership in abatement. 1 Esp. Rep. 452.

(f) See the precedents, 9 Westw. 10. Index, 124. When this new assignment is proper, and when not, see 1 Saund. 299. n. 6. 2 T. R. 172 to 177. *Ante*, vol. 1. Index, tit. New Assignment.

said *A B* prays judgment, and his damages by him sustained, on occasion of the committing thereof to be adjudged to him, &c.

I. In trespass to persons.

* 654

*[*De injuria absque residuo, &c. as ante, 644. but admitting the writ and warrant, and new assignment as follows :*] And the said *A B* further saith, that he exhibited his said bill against the said *C D* and brought his suit thereupon, not only for the said assaulting the said *A B* in the said first count of the said declaration mentioned, and imprisoning him, and keeping and detaining him in prison for the said space of one day, part of the said time in the said first count mentioned, but also for that the said *C D* on the said — day of —, *A. D.* —, before the issuing of the said writ in the said last plea mentioned, and on another and different occasion than by virtue of the said writ, or in execution thereof, made an assault upon the said *A B*, to wit, at, &c. aforesaid, and then and there beat, bruised, wounded, and ill-treated him, and then and there imprisoned him the said *A B*, and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for a long space of time, to wit, for the space of one day, residue of the said time in the said first count mentioned, contrary to the laws and customs of this realm, and against the will of the said *A B*, which said assault and imprisonment above newly assigned is another and different assault and imprisonment than the said assault and imprisonment in the said last plea mentioned, and thereby attempted to be justified. Wherefore, &c. [*conclusion as in the last precedent.*]

To justification under process, new assignment of an imprisonment before issuing of process. (g)

[*Precludi non, as ante, 641.*] Because he saith, that he sued out his original writ in this cause, and brought his said suit thereupon against the said *C D*, not only for the said trespasses in the *said second and last pleas respectively mention-

II. In trespass to personal property.

To plea justifying removal of cart, &c. under a right of way, new assigning extra viam. (h)

* 655

(g) See the precedents, 9 Wentw. Index, 124. As to new assignments in general, see 1 Saund. 299. n. 6. 2 T. R. 172 to 177. *Ante*, vol. 1. Index, tit. New Assignment. See re-

plication of wrongful detainer after discharge by the plaintiff, 2 T. R. 172. (h) See the precedents and law referred to in the note, *ante*, 652.

II. To personal property.

ed, and thereby attempted to be justified, but also for that the said *CD* on the said — day of —, *A. D.* —, out of the said pretended ways in those pleas mentioned, or either of them, seized and took the said cart in the said declaration mentioned, and drew the said staple, and broke, damaged, and spoiled the same; and also the said padlock with which the said cart was fixed and fastened to a certain post, out of the said supposed way, and removed the said cart, and seized, took, and carried away the same, and converted and disposed thereof to his own use, in manner and form as the said *AB* hath above thereof complained against him; which said trespasses above newly assigned, are other and different trespasses from the said trespasses in the said second and last pleas mentioned, and thereby attempted to be justified. Wherefore, &c. [*conclude as ante*, 653.]

New assignment that the corn, &c. was different corn to that mentioned in the plea.(i)

And as to so much of the said last-mentioned plea of the said *CD* as relates to the seizing, taking, and carrying away of the said goods and chattels in the said last count of the said declaration mentioned, except the said hay and grass, parcel of the same goods and chattels, and converting and disposing thereof to his own use, the said *AB* saith, that the wheat, rye, barley, peas and oats, in the last count of the said declaration mentioned, were certain quantities of wheat, rye, barley, peas and oats, of the said *AB* which grew in the said close called —, and which, before the committing of the said trespass in the said last count of the said declaration mentioned, were cut down and reaped by the said *AB*, and were other than, and different from, the said corn in the fifth count of the said declaration mentioned, and no part of the said goods and chattels in the said last plea of the said *CD* mentioned, and this he the said *AB* is ready to verify. Wherefore, &c. [*conclude as ante*, 653.]

* 656

III. In trespass to real property.

To a plea of *liberum tenementum*, new assignment setting out a buttal.(k)

*[*Precludi non, as ante*, 641.] Because he saith, that the said piece or parcel of land, in which, &c. in the said first

(i) See *Pleader's Assistant*, 414. (k) See the precedents, *East. Ent.* 608. 2 Co. 18. b. 9 *West.*

count of the said declaration mentioned, at the said several times, when, &c. was, and is, a certain close in the parish aforesaid called —, abutting, &c. [state the abutments, as ante, 387, 388.] which said close now is, and at the said several times, when, &c. was, another and different close from the said close in the said last plea of the said *C D* mentioned, and therein alleged to be the close, soil, and freehold of the said *C D*, and this he the said *A B* is ready to verify. Wherefore, inasmuch as the said *C D* hath not answered the said trespasses by him committed in the said close, in which, &c. above newly assigned, the said *A B* prays judgment and his damages, on occasion of the committing of the said trespasses above newly assigned to be adjudged to him, &c.

III. In trespasses to real property.

[To the end of the replication, traversing the right of way, &c. if intended to be traversed, and then new assign as follows:] And the said *A B* further saith, that he exhibited his bill against the said *C D* and brought his said action thereupon, not only for the several trespasses in the introductory part of the said second plea mentioned, and therein attempted to be justified, but also for that the said *C D* on the said several days and times in the said declaration mentioned, with force and arms, &c. on other and different occasions than those in the said pleas mentioned, and in a greater degree, and to a greater extent, and with more force and violence than was necessary for abating and removing the said supposed stoppages and obstructions in the said plea mentioned, and for opening the said ways there, committed the said several trespasses in the introductory part of the said second plea mentioned; and also for

To a plea of right of way, traverse of right of way and new assignment, unnecessary damage and extra viam, &c.
(1)
Unnecessary damage.

* 657

Extra viam.

187. 192. and id. Index, 124. Whenever the declaration does not state the name or abutments of the close, &c. and the defendant pleads *liberum tenementum*, if there be the least reason to apprehend that the defendant is entitled to any other close in the same parish, &c. a new assignment is necessary; see 1 Saund. 299. b. c. &c. n. 6. *Ante*, vol. 1. Index, tit. New Assignment.

(1) See the precedents, 9 Wentw. Index, 124. and the law, 1 Saund. 299, 300. n. 6. *Ante*, vol. 1. Index, tit. New Assignment. If in fact there were a right of way, but the plaintiff proceeds for a different trespass, he should not traverse the plea, but should merely new assign, as in the next precedent.

*III. In spec.
p. 20 to read
property.*

that the said *C D* on the said several days and times in the said declaration mentioned, with force and arms, &c. broke and entered the said close of the said *A B*. in the said declaration mentioned, and with his feet in walking, trod down, trampled upon, consumed and spoiled the grass and herbage of the said *A B* there growing, of great value, to wit, of the value aforesaid, on other and different occasions, and for other and different purposes than in the said second plea mentioned, and in other and different parts of the said close, out of the said way, in that plea mentioned, in manner and form as the *A B* hath above thereof complained against him the said *C D*; which said trespasses above newly assigned are other and different trespasses than the said trespasses in the said second plea mentioned, and therein attempted to be justified; wherefore, inasmuch as the said *C D* hath not answered the said trespasses above newly assigned, he the said *A B*, prays judgment and his damages by him sustained on occasion of the committing thereof, to be adjudged to him, &c.

*The like
merely new
assigning.*

And as to the said plea of the said *C D*, by him secondly above pleaded, the said *A B* saith, that he the said *A B*, by reason of any thing by the said *C D* in that plea alleged, ought not to be barred from having or maintaining his aforesaid action thereof against him the said *C D*, because he saith, that he exhibited his bill against the said *C D*, and brought his suit thereupon, not for the said supposed trespasses in the introductory part of the said second plea mentioned, but for that the said *C D*, on, &c. [*as in the last precedent from the obelisk to the end.*]

REJOINDERS IN GENERAL.

*658

*REJOINDERS IN GENERAL.

In the K. B. (or "C. P." or "Exchequer.")

— Term, 48 Geo. III.

And the said *C D* as to the said replication of the said *A B* to the said second plea of him the said *C D*, and which the said *A B* hath prayed may be inquired of by the country, doth the like.

In general
1. Similitur
to replication
concluding to
the country.

And the said *C D* as to the said replication of the said *A B* to the said second plea of him the said *C D*, saith, that the said *A B* ought not, by reason of any thing by him in that replication alleged, to have or maintain his aforesaid action thereof against him the said *C D*. Because he saith, that, &c. (*here state the subject matter of the rejoinder, and if it deny the replication, conclude thus :*) And of this he the said *C D* puts himself upon the country, &c.

2. Commence-
ment of re-
joinder to a
special repli-
cation. (m)

3. Conclusion
to the coun-
try.

And this he the said *C D* is ready to verify ; wherefore he prays judgment if the said *A B* ought to have or maintain his aforesaid action thereof against him the said *C D*, &c.

7 Conclusion
with a verifi-
cation.

(m) The commencement of the rejoinder sometimes is thus : " and the said *C D*, as to the said plea of the said *A B*, by him above pleaded, by way of reply to the said plea of him the said *C D*, by him se-

condly above pleaded in bar, as to the said supposed trespasses in the introductory part of that plea mentioned, says," &c. But this form seems to be unnecessarily prolix.

REJOINDERS IN ASSUMPSIT.

To infancy.

To a replication to a plea of infancy that goods, &c. were necessities, that they were not necessities.

* 659

[*Actio non, ut supra.*] Because he saith, that the said meat, drink, washing, lodging, and other supposed necessities, in the said first and second counts of the said declaration respectively mentioned to have been found and provided by the said *A B* for the said *C D*, and the said goods wares and merchandise, in the said third and fourth counts of the said declaration respectively mentioned, to have been sold and delivered by the said *A B* to the said *C D* were not necessary or suitable to the degree, estate and condition of him the said *C D*, and that the said money in the said sixth count of the said declaration mentioned to have been paid, laid out and expended by the said *A B*, to and for the use and on the account of the said *C D*, was not so paid, laid out and expended by the said *A B* in and about the purchase of such necessities, in manner and form as the said *A B* hath above in his said replication to the said second plea of him the said *C D* in that behalf alleged; and of this he the said *C D* puts himself upon the country, &c.

To a replication to a plea of infancy that defendant when he came of age confirmed the promises, that he did not confirm them. (u)

[*Actio non, us ante, 658.*] Because he saith, that he the said *C D* did not after he attained the age of twenty-one years, and before the commencement of this suit, assent to, ratify or confirm the said several promises and undertakings in the said declaration mentioned, or any or either of them, in manner and form as the said *A B* hath above in his said replication in that behalf alleged; and of this he the said *C D* puts himself upon the country, &c.

To tender.

To a replication to a plea that before the tender that plaintiff had no assent or action at the time of issuing the writ. (o)

[*Actio non, as ante, 658.*] Because he saith, that though true it is, that he the said *C D* did make such promise and

(u) As to this rejoinder and the evidence, 1 T. R. 648. 598. and see the precedent and law, 1 Wils. 142. 2 Burr. 952.

(o) See the replications, ante, 597,

undertaking, as to the said sum of —*l.* parcel, &c. before the exhibiting of the said bill of the said *A B*, as in and by the said bill is alleged, yet the said *C D* in fact saith, that he the said *C D* did not at any time before the issuing of the said writ of *latitat* as aforesaid, *promise and undertake to pay the said *A B* the said sum of —*l.* parcel, &c. in manner and form as the said *A B* hath above in his said replication in that behalf alleged; and of this he the said *C D* puts himself upon the country, &c.

To tender.

* 660

[*Actio non*, as ante, 658.] Because he saith, that by the course and custom of the said court of our said lord the king here, a writ of *latitat* sued out after the end of any term, is supposed to have issued out of the said court here within the term next preceding. And the said *C D* further saith, that the said writ of *latitat* in the said replication mentioned, was really and truly sued out of the said court here, by the said *A B*, after the 28th day of *November*, in the said replication mentioned, (being the last day of *Michaelmas* term, in the said — year of our said lord the king,) that is to say, on the 8th day of *December*, in that year, and on the day and year last aforesaid, was signed, according to the form of the statute in such case made and provided, † and that the said *C D* before the said writ of *latitat* was so really and truly sued out of the said court as aforesaid, to wit, on the said — day of —, at, &c. aforesaid, did tender and offer to pay the said sum of —*l.* parcel, &c. to the said *A B*, in manner and form as he the said *C D* hath in his said second plea in that behalf alleged. And this, &c. [*conclude with a verification*, as ante, 658.]

To replication of a *latitat* stating the time when it was really issued, and tender before that time. (p)

[*Actio non*, as ante, 658.] Because he saith, that by the course and practice of this court, a bill exhibited in the same court by any person as debtor of our lord the king after the commencement of any term, and before the end thereof, may, when the process upon which the same is founded, is returnable in the same term, be stated

The like of process out of the exchequer.

(p) See the replication, ante, 597, 598. and the precedent, 2 Burr. 952.

To tender.

* 661

and alleged to have been exhibited at any time in such term after the cause of action, upon which such bill is founded, *is therein stated to have accrued, although in truth and in fact such bill was not exhibited at the time at which it was so stated and alleged to have been exhibited. but at a prior or subsequent time, and the said *C D* saith, that although the said declaration is entitled generally of this term, and although it is stated and alleged in the introductory part thereof, that the said *A B* came as a debtor before the barons of this exchequer, on, &c. in this same term, and complained by his bill against the said *C D* as present in court the same day. Yet the said *C D* saith, that the said bill was really and in truth exhibited by the said *A B* against the said *C D*, after the said — day of —, that is to say, on, &c. in this same term and not before. And the said *C D* further says, that the said *A B* commenced this action, and sued out of the said court here a certain writ of our said lord the king, called a *subpœna ad respondendum*, being the first process in this action against the said *C D*, to compel his appearance herein after the hour of ten o'clock on the — day of —, in this same term, and that before the said commencement of this suit, and before the exhibiting of the said bill, to wit, at the hour of nine o'clock on the — day of —, at, &c. aforesaid, he the said *C D* was ready and willing, and then and there tendered, and offered to pay to the said *A B* the said sum of —*l.* parcel, &c. in manner and form as he the said *C D* hath above in his said second plea in that behalf alleged. And this, &c. [*conclude with a verification, as ante, 658.*]

To replication to plea of tender of a prior demand, no such demand.

[*Actio non, as ante, 658.*] Because he saith, that the said *A B* did not, after the time when the said supposed causes of action, in the said declaration mentioned, accrued, and before the said *C D* tendered and offered to pay the said sum of —*l.* parcel, &c. as he the said *C D* hath in his said plea in that behalf alleged, demand the said sum of —*l.* parcel, &c. of and from the said *C D* or request him to pay the same, or any part thereof, in manner and form as the said *A B* hath above in his said replication *in that behalf alleged; and of this he the said *C D* puts himself upon the country, &c.

* 662

[*Actio non, as ante, 658.*] Because he saith, that the said *A B* did not, after the making of the said tender in the said last plea mentioned, and before the exhibiting of the said bill, demand of or request the said *C D* to pay to him the said *A B* the said sum of —*l.* parcel, &c. in the said plea mentioned, in manner and form as the said *A B* hath above in his said replication in that behalf alleged. And of this he the said *C D* puts himself upon the country, &c.

To tender,
&c.

To replication to plea of tender of a subsequent demand, no such demand.
(q)

[*Actio non, as ante, 658.*] Because he saith, that the said deed of release in the said second plea mentioned, was had and obtained fairly, and not by the fraud or covin of the said *C D* in manner and form as the said *A B* hath above in his said replication in that behalf alleged; and of this he the said *C D* puts himself upon the country, &c.

To release.

Rejoinder that the release was obtained fairly.
(r)

[*Actio non, as ante, 658.*] Because he saith, that the said several supposed causes of action in the said declaration mentioned, did not, nor did any or either of them accrue to the said *A B* within six years next before the issuing of the said precept (or "*writ*") in the said replication to the said second plea mentioned, in manner and form as the said *A B* hath above in his said replication in that behalf alleged; and of this he the said *C D* puts himself upon the country, &c.

To statute of limitations.

Rejoinder that the action did not accrue within six years of issuing the writ.
(s)

[*Same as the precedent, ante, 660. to the obelisk, and then proceed as follows:*] And the said *C D* further saith, that he did not promise or undertake, in manner and form *as the said *A B* hath above thereof complained against him at any time within six years next before the said writ was so really and in truth issued as aforesaid. And this, &c. [*conclude with a verification, as ante, 658.*]

To replication of a liti-tat, shewing the time when it was issued, and non assumpsit infra sex annos of that time.
(t)

* 663

(q) See the replication, *ante*, 601. and the precedents, 3 Wentw. 181. 3 Wentw. Index. As to the law, see 1 Esp. Rep. 116.

(r) See the replication, *ante*, 603. and 3 Wentw. Index, 12. and 13.

(s) See the replication, *ante*, 606. and the precedents, 3 Wentw. Index, 20. &c.

(t) See the replication, *ante*, 606. and the precedent and law, 2 Burr. 952. 3 Wentw. Index, 20.

Statute of limitations.
Transverse of the intent of issuing the writ.(u)

[*Actio non, as ante, 658.*] Because he saith, that the said writ in the said replication mentioned, was issued by the said *A B* with intent to attach him the said *C D* by pledges, and then to enter and record his appearance in the said court here, and upon such appearance so recorded and entered according to the custom of the said court here, to declare against him the said *C D* in a certain plea of debt upon demand for the sum of —*l*. Without this, that the said original writ was issued with intent that the said *A B* upon the appearance of the said *C D*, should declare against him the said *A B* in manner and form as he the said *A B* hath above alleged. And this, &c. [*conclude with a verification, as ante, 658.*]

To replication that defendant was beyond sea, &c. that plaintiff did not exhibit his bill within six years of defendant's first return.

(x)

[*Actio non, as ante, 658.*] Because he saith, that the said *A B* did not exhibit his said bill against him the said *C D*, within six years next after his the said *C D*'s first return into this kingdom from beyond the seas, after the accruing of the said several causes of action unto the said *A B* in manner and form as the said *A B* hath above in his said replication in that behalf alleged. And of this he the said *C D* puts himself upon the country, &c.

Against executors, &c.

To replication that assets had come to hand since the exhibiting the bill, denying the fact.

(y)

* 664

[*Actio non, as ante, 658.*] Because he saith, that no goods or chattels of the said *E F* deceased, at the time of his death, have, since the exhibiting of the bill of the said *A B* against him the said *C D*, in this behalf, come to or been in the hands of him the said *C D* as administrator as aforesaid to be administered, in manner and form *as the said *A B* hath in his said replication in that behalf alleged; and of this he the said *C D* puts himself upon the country, &c.

To replication that the judgments against the defendants were obtained by fraud, denying the fraud.

(z)

[*Actio non, as ante 658.*] Because he saith, that the said judgment in the said first plea of him the said *C D* first mentioned, was had and obtained for a true and just debt, really

(u) See the precedent, 1 Lutw. 100. and 3 Wentw. Index, 20.

(x) See the replication, ante, 607. and the precedent, 1 Wentw. 327.

(y) See the replication, ante, 610.

(z) See the replication, ante, 610. and the precedents, 3 Wentw. Index, 26. &c. 1 Samd. 103. in the notes.

and truly due and owing to the said *E F*, and not by the fraud or covin of him the said *C D*, or with his intent to defraud the said *A B* of his said debt, in manner and form as the said *A B* hath above in his said replication in that behalf alleged; and the said *C D* further saith, that the said judgment in the said first plea of him the said *C D* secondly mentioned, was, &c. (*similar denial to each judgment;*) and of this he the said *C D* puts himself upon the country, &c.

Against executors, &c.

REJOINDERS IN DEBT.

[*Similiter to the replication concluding to the country, as ante,* 658.] And the said *C D* as to the said replication of the said *A B* to the said second plea of him the said *C D* saith, that the said *A B*, by reason of any thing by him in that replication alleged, ought not to have or maintain his aforesaid action thereof against him the said *C D*, because he says, that the said *E F* and *G H* did not make any such award of or concerning the said premises, in manner and form as the said *A B* hath above in his said replication alleged; and of this he the said *A B* puts himself upon the country, &c.

On awards.
To replication stating an award, denying the award.
(a)

* 665
[*Similiter to replication concluding to the country, as ante,* 658. *Commencement of rejoinder to special replication, as ante,* 658.] Because he saith, that the inhabitants and parishioners of the said parish were not, nor were any or either of them forced or obliged to expend the said sum of —*l.* or any part thereof, for, in or about the procuring necessary food or nourishment for the said child, nor were the said inhabitants or pa-

On bastardy bonds, &c.
To replication in debt on bastardy bond, shewing damage, non damnificatus.
(b)

(a) See the replication, *ante*, 619. *damnificatus*, he cannot afterwards
(b) See the replication, *ante*, 621. *rejoice* that the parishioners were
and the precedents of rejoinders, 7 *damnified* of their own wrong, for
Wentw. Index, 615. 5 Wentw 531. that would be a departure, 2 Saund.
If the defendant has pleaded *non* 80. 1 H. Bla. 253. 1 Saund. 113.

REPLICATIONS IN REPLEVIN.

tardy
&c. rishioners, or any or either of them; damnified by reason or on account of the maintenance or bringing up of the said child, in manner and form as the said *A B* hath above in his said replication in that behalf alleged; and of this he the said *C D* puts himself upon the country, &c.

replica-
a bond
oned
F ac-
ing, &c.
F did
t, &c.
[Commencement, as ante, 658.] Because he saith, that the said *E F* after the making of the said writing obligatory; and after he had received the said monies in the said replication mentioned, and before the exhibiting of the said bill, to wit, on, &c. at, &c. aforesaid, well and truly accounted for and paid the same sums of money received by him the said *E F*, as aforesaid. And this he the said *C D* is ready to verify; wherefore he prays judgment if the said *A B* ought to have or maintain his aforesaid action thereof against him, &c.

36

*REPLICATIONS IN REPLEVIN.

In the K. B. (or "C. P.")

— Term, 48, Geo. III.

eral.
er to
bar
ling to
untry.
C D } ats. } And the said *C D* as to the said plea in bar of the
A B. } said *A B* by him first above pleaded, and which he hath
prayed may be inquired of by the country, doth the like.

nee-
fare.
n in
L
C D } ats. } And the said *C D* as to the said plea in bar of the said
A B. } *A B* to the said first avowry of him the said *C D* saith,
that he by reason of any thing by the said *A B* in that plea
above alleged, ought not to be barred from avowing (or "*ac-*
knowledging") the taking of the said cattle, goods and chattels in

(c) See the replication, ante, 622. Wentw. Index, 616.
and the precedents of rejoinders, 7.

the said declaration mentioned in the said place, in which, &c. *In general* and justly, &c. because he saith, that, &c. (or if the replication merely reassert matter alleged in the avowry or cognisance, say, because "as before" he saith, &c. Here state the subject matter of the replication, and if it be merely in denial of the plea in bar, conclude to the country as follows :) And of this he the said *C D* puts himself upon the country, &c. *Conclusion to the country.*

And this he the said *C D* is ready to verify; wherefore, as before, he prays judgment, and a return of the said cattle, goods and chattels, together with his damages, &c. according to the form of the statute in such case made and provided, to be adjudged to him, &c. *Conclusion with a verification. (d)*

*And the said *C D* as to the plea in bar of the said *A B* as to the said sum of —*l.* residue of the said rent in the said avowry mentioned, saith, that he the said *C D*, by reason of any thing by the said *A B* therein alleged, ought not to be barred from avowing (or "acknowledging") the taking of the said cattle, goods and chattels in the said declaration mentioned, in the said place, in which, &c. and justly, &c. because he saith, that he the said *A B* did not tender or offer to pay to him the said *C D* the said sum of —*l.* of the rent aforesaid, in manner and form as the said *A B* hath above in his said plea in bar alleged; and of this he the said *C D* puts himself upon the country, &c. ** 667 For rent, &c. To plea in bar of a tender, denial of tender. (e)*

[Commencement as in the last precedent.] Because he saith, that after the said, &c. (the day when the rent became due, as stated in the avowry,) and after the said supposed tender in that plea mentioned, and before the taking of the said goods and chattels in the said place, in which, &c. to wit, on, &c. aforesaid, at, &c. aforesaid, the said *E F* demanded of the said *A B* the said sum of —*l.* the residue of the said rent, and required him to pay the same to the said *E F*, which the said *A B* then and there wholly neglected and refused to do; wherefore the *To a plea in bar of a tender to a cognisance for rent, a subsequent demand. (f)*

(d) As to this conclusion, see *ante*, 509, 510.

(f) See the plea in bar, *ante*, 652, and as to replications of a subsequent demand, *ante*, 600.

(e) See the plea in bar and notes, *ante*, 682.

REPLICATIONS

damage
nt.

said *C D* as the bailiff of the said *E F*, well acknowledges the taking of the said goods and chattels in the said place, in which, &c. and justly, &c. for and in the name of a distress for the said rent so due, in arrear, and unpaid to the said *E F* as aforesaid; and the said rent still remains so due and unpaid in manner and form as the said *C D* hath above alleged. And this, &c. [*conclude with a verification, as ante, 666.*]

plea in
a demise
the de-
nt to the
iff, sta-
a notice
t. (g)
68

[*Precludi non, as ante, 666.*] Because he saith, that he the said *C D*, after the making of the said demise in *the said plea in bar mentioned, and whilst the said *A B* was possessed of the said place, in which, &c. under and by virtue of the said demise, as tenant thereof to the said *C D*, and half a year before the — day of —, *A. D.* —, to wit, on, &c. at, &c. gave due notice to, and then and there required the said *A B* to quit and deliver up the possession of the said demised premises, with the appurtenances, unto him the said *C D*, on the said — day of —, *A. D.* — then next following, and by means thereof afterwards and before the said time, when, &c. to wit, on the day and year last aforesaid, the said tenancy, and the estate and interest of the said *C D* in the said demised premises and the said place in which, &c. with the appurtenances, wholly ended and determined. to wit, at, &c. aforesaid, † and thereupon the said *C D* after the said tenancy was so ended and determined as aforesaid, and before the said time, when, &c. to wit, on the — day of —, in the same year, entered into the said place, in which, &c. and then and there became and was lawfully possessed thereof, and continued so possessed until the said time, when, &c. and because the said cattle, after the said demise became and was so ended and determined as aforesaid, and whilst the said *C D* was so possessed as aforesaid, and at the said time, when, &c. were wrongfully in the said place, in which, &c. treading, &c. [*conclude as ante, 517. 666. with a verification.*]

(g) See the plea in bar, *ante, 634.* of a notice to quit, *ante, 183, 184.* and 7 T. R. 431. As to the statement

[*Precludi non, as ante, 666.*] Because he saith, that he the said *C D*, and all other the tenants and occupiers of the said close, in which, &c. for the time being, from time whereof the memory of man is not to the contrary, have not repaired and amended, nor have been used and accustomed to repair and amend, nor of right ought to have repaired and amended, nor ought the said *C D* before or at the said several times, when, &c. of right to have repaired and amended, nor still of right ought to repair and amend, the said hedge and fence between the said close of the said *C D*, and the said close in which, &c. when and as often as occasion hath required, to prevent cattle feeding and depasturing or being in the said close of the said *C D*, from erring or escaping thereout, through the defects and insufficiency of the said hedge and fence, into the said close in which, &c. and doing damage there in manner and form as the said *A B* hath above in his said plea in bar in that behalf alleged; and of this he the said *C D* puts himself upon the country, &c.

To damage
tenant.

To a plea in
bar of defect
of fences, den-
ial of de-
fendant's ob-
ligation to re-
pair. (h)

* 669

[*Precludi non, as ante, 666.*] Because he saith, that the said hedge and fence in the said plea in bar mentioned, before or at the said time, when, &c. were not ruinous, prostrate, or fallen down for want of needful, or necessary making, repairing, or amending thereof in manner and form as the said *A B* hath above in his said plea in bar in that behalf alleged; and of this he the said *C D* puts himself upon the country, &c.

The like den-
ial of defect
of fences.

[*Precludi non, as ante, 666.*] Because he saith, that the said *A B* and all those whose estate, &c. (*here deny the right of common as stated in the plea in bar to the end of the words, "as to the said messuage and land with the appurtenances belonging and appertaining," and conclude as follows:*) in manner and

To a plea in
bar to an
avowry da-
mage-tenant,
stating a right
of common
over locus in
quo, traver-
sing the right
of common.
(i)

(h) See the pleas in bar, *ante*, 635, 636. This replication should conclude to the country, 1 Saund. 103. The replication may be that the cattle were unruly, as *ante*, 649. or that the plaintiff turned the cattle in, as *ante*, 649.

(i) See the plea in bar, *ante*, 638. See the replications in trespass, *ante*, 650, 651. Sometimes the replication concludes with a formal traverse and verification; see 2 Saund. 322. but this is unnecessary and improper, see *ante*, 651.

*To damage
feasant.*

form as the said *C D* hath above in his said plea in bar in that behalf alleged; and this be the said *C D* prays may be inquired of by the country, &c.

In the K. B. (" C. P." or " Exchequer.")

— Term, 48 Geo. III.

In general.

1. Similiter,
to replication
concluding to
the country.

C D } And the said *C D*, as to the said replication of the said
ats. } *A B* to the said second plea of him the said *C D*, and
which the said *A B* hath prayed may be inquired of by the
country, doth the like.

2. Rejoinder
to a replica-
tion conclud-
ing with a ve-
rification.

And the said *C D*, as to the said replication of the said *A B* to the said third plea of him the said *C D* saith, that the said *A B* ought not by reason of any thing by him in that replication above alleged to have or maintain his aforesaid action against him the said *C D* in respect of the said supposed trespasses in the introductory part of the said third plea and in the said declaration mentioned, because he saith, that, &c. (*here state the subject matter of the rejoinder, and the conclusion to the country will be as follows :*) And of this he the said *C D* puts himself upon the country, &c.

3. Conclusion
to the coun-
try.

4. Conclusion
with a verifi-
cation.

And this he the said *C D* is ready to verify ; wherefore, as before, he prays judgment if the said *A B* ought to have or maintain his aforesaid action thereof against him the said *C D* in respect of the said supposed trespasses in the introductory part of the said third plea and in the said declaration mentioned, &c.

*To real pro-
perty.*

To a replica-
tion of a de-
mise to the
plaintiff, a no-
tice to quit.

[*Actio non, ut supra.*] Because he saith, that he the said *C D* after the making the said demise, &c. (*state the notice to quit, and the determination of the tenancy, precisely as in the precedent, ante, 667, 668. to the obeliak, saying, " before*

either of the said times, when," &c. instead of "the said time, To real pro-
when," &c. and then proceed as follows :) and thereupon he ^{party.}
the said *C D* after the said tenancy was so ended and deter-
mined as aforesaid, to wit, at the said several times, when,
&c. entered into the said dwelling-house, in which, &c. and
committed the said supposed trespasses in the introductory
part of the said second plea mentioned, as he lawfully might,
for the cause aforesaid, to wit. at, &c. aforesaid. And this,
&c. [conclude with a verification, as ante, 670.]

And the said *C D* as to the said replication of the said *A B* Rejoinder re-
to the said second plea of him the said *C D*, as before, saith, ^{asserting right}
that he the said *C D*, and all those whose estate he now hath, ^{of common,}
and at the said several times, when, &c. had, of and in the ^{&c. as stated}
said messuage and land, with the appurtenances, in the said se- ^{in the plea.}
cond plea mentioned, for the time being, from time whereof ^(k)
the memory of man is not to the contrary, have had, and have
been used and accustomed to have, and of right ought to have
had, and the said *C D* still of right ought to have, for himself
and themselves, his and their tenants and farmers, occupiers
of the said messuage and land, with the appurtenances, com-
mon of pasture, in, upon, and throughout the said close, in
which, &c. for all his and their commonable cattle, *levant* and
couchant in and upon the said messuage and land, with the ap-
purtenances, in every year, at all times of the year, as to the
said messuage and land, with the appurtenances belonging and
appertaining, in manner and form as he the said *C D* hath in
his said second plea above alleged. And of this he the said
C D puts himself upon the country, &c.

(k) We have seen that a replica- ante, 651. and 1 Saund. 103. b. If
tion, denying a right of common, or the replication be improperly con-
any other prescriptive right, or the cluded with a formal traverse and
obligation to repair as stated in the verification, the rejoinder must re-
plea, should conclude to the country, assert the subject matter of the plea,
and without a formal traverse, see as in the above precedent.

*SURREJOINDERS.

In the K. B. ("C. P." or "Exchequer.")

— Term, 48 Geo. III.

Common
form of a sur-
rejoinder.

A B } And the said *A B*, as to the said rejoinder of the said
agst. } *C D* to the said replication of him the said *A B* to
the said second plea of him the said *C D*, saith, that he by reason of any thing by the said *C D* in that rejoinder above alleged, ought not to be barred from having or maintaining his aforesaid action thereof against him the said *C D*, because he saith, that, &c. (*state the subject matter of the surrejoinder, and if merely a denial of the rejoinder, conclude thus :*) And this he the said *A B* prays may be inquired of by the country, &c.

Conclusion to
the country.

Conclusion
with a verifi-
cation in tres-
pass.

[*If the surrejoinder be of new matter, conclude with a verification similar to the conclusion of a replication. The form in trespass is as follows :*] And this he the said *A B* is ready to verify; wherefore, as before, he prays judgment and his damages by him sustained, on occasion of the committing of the said trespasses, to be adjudged to him, &c.

Rejoinder in
replevin. (l)

And the said *A B*, as to the said replication of the said *C D*, to the said plea in bar of him the said *A B* to the said avowry of the said *C D*, saith, that the said *C D* ought not, by reason of any thing by him in that replication alleged, to avow the taking of the said cattle in *the said close in which, &c. and justly, &c. because he saith, that, &c. (*here state the subject matter of the rejoinder, and conclude to the country, or with a verification as in a plea in bar, ante, 630.*)

* 673

Surrejoinder
in trespass,
that the notice
to quit was
waived. (m)

[*Precludi non, as ante, 672.*] Because he saith, that after the giving of the said notice in the said rejoinder mentioned,

(l) See the precedents of rejoinders in replevin, 8 Wentw. 6—13. 671. Lil. Ent. 360.

(m) See the rejoinder, *ante*, 670.

and before the expiration of the said tenancy, to wit, on, &c. *In trespass.* at, &c. aforesaid, the said *C D* waived, relinquished and abandoned the said notice, and then and there assented and agreed with the said *A B* to the continuance of the said tenancy in the said replication mentioned, and the said tenancy did continue from thenceforth, until, and at, and after the said time, when, &c. to wit, at, &c. aforesaid. And this, &c. [*conclude with a verification, as ante, 672.*]

REBUTTERS AND SURREBUTTERS.

In the K. B. (or "C. P." or "Exchequer.")

— *Term, 48 Geo. III.*

C D } And the said *C D*, as to the said surrejoinder of the *Rebutter deny-*
ats. } said *A B* to the said rejoinder of him the said *C D* *ing the*
A B. } to the said replication to the said second plea of him the said *C D*, *waver of the*
saith, that the said *A B* ought not, by reason of any thing by *notice to quit.*
him in that surrejoinder alleged, to have or maintain his aforesaid action against him, in respect of the said supposed trespasses in the introductory part of the said second plea mentioned, because he saith, that he the said *C D* did not waive, relinquish or abandon the said notice, or assent or agree with the said *A B* * to the continuance of the said tenancy in the said replication mentioned, nor did the same continue in manner and form as the said *A B* hath above in his said surrejoinder in that behalf alleged; and of this he the said *C D* puts himself upon the country, &c.

* 674

In the K. B. (or "C. P." or "Exchequer.")

— *Term, 48 Geo. III.*

A B } And the said *A B* as to the said rebutter of the said *Surrebutter,*
agt. } *C D* and whereof he hath put himself upon the country, *similiter.*
C D. } doth the like.

In trespass.

PLEAS, &c. TO NEW ASSIGNMENTS.

In the K. B. (or "G. P." or "Exchequer.")

— Term, 48 Geo. III.

General issue,
to new assign-
ment.

C D } And the said *C D*, as to the said several supposed
ats. } *A B.* } trespasses above newly assigned, saith, that he is not
 guilty thereof in manner and form as the said *A B* hath above
 thereof complained against him; and of this he puts himself
 upon the country, &c.

Commencement of a special plea to a new assignment. (n)

And for a further plea in this behalf, as to the said several supposed trespasses above newly assigned, the said *C D*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in that case made and provided, saith, that the said *A B* ought not to have or maintain his aforesaid action thereof against him, because he saith, that, &c.

Conclusion with a verification.

* 675

And this he the said *C D* is ready to verify; wherefore he prays judgment, if the said *A B* ought to have or *maintain his aforesaid action thereof against him, in respect of the said supposed trespasses above newly assigned, &c.

Similiter, to general issue to new assignment.

And the said *A B*, as to the said plea of the said *C D* by him first above pleaded to the said trespasses above newly assigned, and whereof he hath put himself upon the country, doth the like.

Commencement of replication to a special plea to a new assignment.

And the said *A B*, as to the said plea of the said *C D* by him secondly above pleaded, as to the said trespasses above newly assigned, saith, that he the said *A B* ought not, by reason of any thing by the said *C D* in that plea alleged, to be barred

(n) See a plea of set-off to a new assignment in *assumpsit*, 3 Wentw. 163.

from having and maintaining his aforesaid action thereof against him the said *C D* in respect of the said several trespasses above newly assigned. Because he saith, that, &c.

And this he the said *A B* is ready to verify ; wherefore he prays judgment and his damages by him sustained, by reason of the committing of the said several trespasses above newly assigned, to be adjudged to him, &c.

Conclusion
with a verifi-
cation.

*PLEAS PUIS DARREIN CONTINUANCE.

* 676

In the King's Bench.

— next after — (p)
in — Term, 48 Geo. III.

C D } And now at this day, that is to say, on, — next after
ats. } *A B*. } —, in this same term, until which day the plea
aforesaid was last continued, comes the said *A B* by —
his attorney, and the said *C D* by his attorney aforesaid, and
the said *C D* saith, that the said *A B* ought not further (g) to
have or maintain his aforesaid action thereof against him,
because he saith, that after the last continuance of this cause
that is to say, after — next after —, in this same —
term, from which day this cause was last continued, and before
this day, to wit, on, &c. at, &c. he the said *A B*—(here state the
release, as ante, 439. or rather subject matter of the plea)—and
this he the said *C D* is ready to verify ; wherefore he prays
judgment if the said *A B* ought further to have or maintain
his aforesaid action thereof against him, &c.

Plea puis dar-
rein continu-
ance of re-
lease, &c. not
at the assizes.
(o)

(o) As to this plea in general, ante,
vol. I. Index, tit. Pleas Puis Darrein
Continuance. Bull. N. P. 309. Sel-
wyn's N. P. 118. Com. Dig. Abate-
ment, H. 32, I. 24.

(p) As to the title, see 3 T. R. 554.
(q) This seems necessary, see 4
East, 507. Ante, 431. second prece-
dent.

To pleas.

In the K. B. (or "C. P." or "Exchequer.")

— Term, 48 Geo. III.

General demurrer to a plea in assumpsit.

And the said *A B*, as to the said plea of the said *C D* by him secondly above pleaded, saith, that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him the said *A B* from having or maintaining his aforesaid action thereof against him the said *C D*, and that he the said *A B* is not bound by the law of the land to answer the same, and this he the said *A B* is ready to verify; wherefore, for want of a sufficient plea in this behalf, he the said *A B* prays judgment and his damages, by reason of the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, &c.

Special demurrer in assumpsit.

[*Same as the above precedent to the end, and then proceed as follows:*] And the said *A B*, according to the form of the statute in such case made and provided, states and shews to the court here, the following causes of demurrer to the said second plea, that is to say, that, &c. (*here set out the causes, and conclude thus:*) And also that *the said second plea is in other respects uncertain, informal, and insufficient, &c.

* 680

To a plea in debt.

[*General or special demurrer, as in the precedents, ante, 679. except as to the prayer of judgment, which is as follows:*] Prays judgment and his debt aforesaid, together with his damages by him sustained, on occasion of the detention thereof, to be adjudged to him, &c.

To a plea in covenant.

[*General or special demurrer as in the precedents, ante, 679. except as to the prayer of judgment, which is as follows:*] Prays judgment and his damages by him sustained, on occasion of the said breach of covenant, in the said declaration mentioned, to be adjudged to him, &c.

To a case. plea in

[*General or special demurrer as in the precedents, ante, 679. except as to the prayer of judgment, which is as follows:*] Prays judgment and his damages by him sustained on occa-

tion of the committing of the said grievances, to be adjudged *To pleas.*
to him, &c.

And the said *A B* saith, that the said avowry or cognisance of the said *C D*, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said *C D* to avow or acknowledge the taking of the said cattle in the said declaration above mentioned, in the said place, in which, &c. to be just; and that he the said *A B* is not bound by the law of the land to answer the same, and this he the said *A B* is ready to verify; wherefore he prays judgment, and his damages, by reason of the taking and unjustly detaining of the said cattle, to be adjudged to him, &c. *To an avowry or cognisance.*

[*General or special demurrer as in the precedents, ante, 679. To a plea in trespass.* except as to the prayer of judgment, which is as follows:] Prays judgment and his damages by him sustained, *on occasion of the committing of the said trespasses to be adjudged to him, &c. * 681

In the K. B. (or "C. P." or "Exchequer.")

— Term, 48 Geo. III.

C D } And the said *C D* saith, that the said replication of the *To replication*
ats. } said *A B* to the said second plea of him the said *C D*, *ations, &c.*
and the matters therein contained in manner and form as the *General de-*
same are above pleaded and set forth, are not sufficient in law *murrer to a*
for the said *A B* to have or maintain his aforesaid action there- *replication.*
of against him the said *C D*; and that he the said *C D* is not
bound by the law of the land to answer the same, and this he
the said *C D* is ready to verify; wherefore, for want of suffi-
cient replication in this behalf, he the said *C D* prays judgment,
if the said *A B* ought to have or maintain his aforesaid action
thereof against him, &c.

[*Same as the above to the end, and then as follows:*] And the said *C D*, according to the form of the statute in such case made and provided, states, and shews to the court here, the *Special de-*
murrer to a
replication.

To replication.

following causes of demurrer in law to the said replication, that is to say, that, &c. (*here state the causes, and conclude thus:*) And also, for that the said replication is in other respects uncertain, informal, and insufficient, &c.

Demurrer to a plea in bar to a cognisance. (t)

And the said *C D* saith, that the said plea in bar of the said *A B* to the said cognisance of him the said *C D*, and the matters in the said plea in bar contained, are not sufficient in law to bar him the said *C D* from having a return of the said cattle, and that he the said *C D* is not bound by the law of the land to answer the same, and this he the said *C D* is ready to verify; wherefore, for want of a sufficient plea in bar in this behalf, he the said *C D*, as before, prays judgment, and a return of the said cattle, together with his damages, costs and charges, by him in this behalf expended, according to the form of the statute in such case made and provided, to be adjudged to him, &c.

* 682

JOINDERS IN DEMURRER.

In the K. B. (or "C. P." or "Exchequer.")

— Term, 48 Geo. III.

Joinder in demurrer to a declaration or replication in assumpsit.

A B } agst. } And the said *A B* saith, that the said declaration, (or *C D*. } "*first count,*" or "*replication,*") and the matters therein contained in manner and form as the same are above stated and set forth, are sufficient in law for him the said *A B* to have and maintain his aforesaid action thereof against him the said *C D*, and the said *A B* is ready to verify and prove the same as the court here shall direct and award; wherefore, inasmuch

(t) See 1 Saund. 349. 8 Wentw. 143. 5 Wentw. 18.

as the said *C D* hath not answered the said declaration, (or *Joinders* "first count," or "replication,") nor hitherto in any manner denied the same, the said *A B* prays judgment, and his damages, by reason of the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, &c.

A joinder in demurrer to a declaration or replication in debt, covenant, detinue, case, or trespass, is precisely similar to the above, except in the prayer of judgment, which is to be according to the form of action, and the same as in the conclusion to the pleas, *ante*, 679, 680. The like in other actions.

And the said *C D* saith, that the said plea of him the said *CD*, and the matters therein contained, are sufficient in law to quash the said writ, (or "*bill*,") and which said plea, and the matters therein contained, he the said *C D* is ready to verify and prove, as the court here shall direct, * &c. wherefore, inasmuch as the said *A B* hath not denied, nor in any manner answered the said plea, he the said *C D*, as before, prays judgment of the said writ, (or "*bill*,") and that the same may be quashed, &c. Joinder in demurrer to a plea in abatement.

* 683

And the said *C D* saith, that his said plea by him secondly above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said *A B* from having or maintaining his aforesaid action thereof against him the said *C D*, and that he the said *C D* is ready to verify and prove the same, when, where, and in such manner as the said court here shall direct and award ; wherefore, inasmuch as the said *A B* hath not answered the said plea, nor hitherto in any manner denied the same, the said *C D* prays judgment, and that the said *A B* may be barred from having or maintaining his aforesaid action thereof against him the said *C D*, &c. Joinder in demurrer to a plea in bar in assumpsit, debt, covenant, detinue, case, or trespass.

And the said *A B* saith, that the said plea in bar of him the said *A B*; to the said cognisance of the said *C D*, and the Joinder to a demurrer to a plea in bar in replevin. (u)

Joinders.

matters in the said plea in bar contained, are sufficient in law to bar him the said *C D* from having a return of the said cattle, and which said plea in bar, and the matters therein contained, he the said *A B* is ready to verify and prove as the court here shall direct and award; and because the said *C D* hath not answered the said plea in bar, nor in any manner denied the same, he the said *A B*, as before, prays judgment, and his damages, on occasion of the taking and unjustly detaining of the said cattle, to be adjudged to him, &c.

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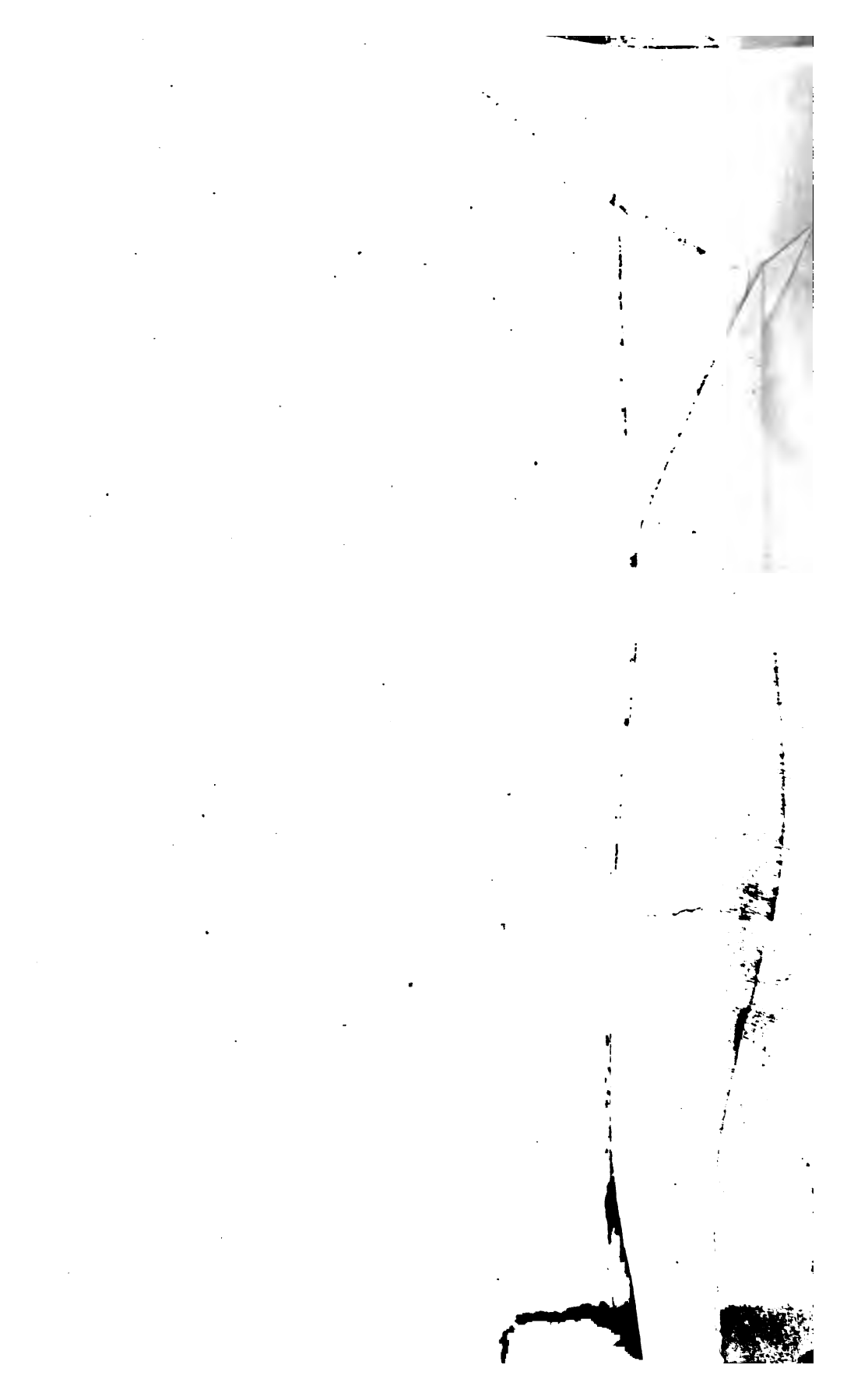
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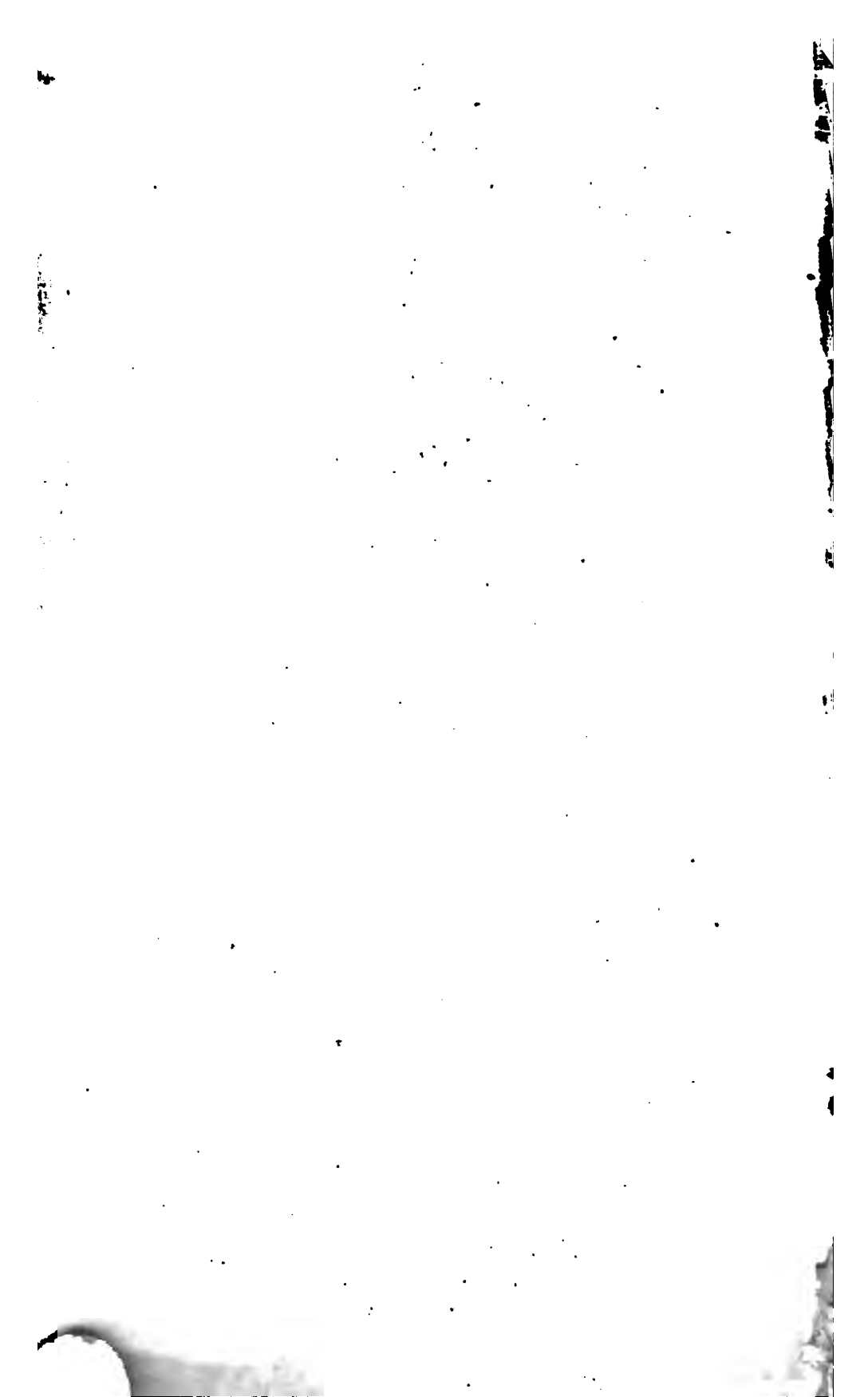
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